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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

AUCLAIR TRANSPORTATION, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of Massachusetts

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, Auclair Transportation, Inc., Gay's Express, Inc., Graf Bros., Inc., H. P. Welch Co., Alvin R. Holmes d/b/a Holmes Transportation Service and/or Jones Express, J. E. Faltin Motor Transportation, Inc., Law Motor Freight, Inc., P. S. Dubrey Trucking Co., Taylor's Express Co., and American Trucking Associations, Inc., appeal from the judgment of the United States District Court for the District of Massachusetts entered on September 11, 1963, dismissing their complaint to set aside an order of the Interstate Commerce Commission, dated October 5, 1962, authorizing the performance of motor

carrier operations by Railway Express Agency, Inc., a wholly-owned affiliate of certain railroads. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 221 F. Supp. 328 (adv. sheets), and copies of the opinion and judgment are attached hereto as Appendix A. A copy of the report of the Interstate Commerce Commission in *Railway Exp. Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311,[1] and a copy of its unreported order are attached hereto as Appendix B. The report of division 1 of the Interstate Commerce Commission in *Railway Exp. Agency, Inc., Extension—Newport, Vt.*, 84 M.C.C. 435, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to suspend, enjoin, annul and set aside the report and order of the Interstate Commerce Commission, dated October 5, 1962. The judgment of the District Court for the District of Massachusetts was entered September 11, 1963, and notice of appeal was filed in that court November 5, 1963. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in the case: *United States* v. *Drum*, 368 U.S. 370; *American Trucking Associations, Inc.* v.

[1] This report embraces five consolidated cases, MC-66562 (Sub No. 1515, 1577, 1594, 1595, and 1687). Three of these proceedings (Sub Nos. 1577, 1594, and 1595) were the subject of an earlier report of division 1 of the Commission (see Appendix C).

United States, 364 U.S. 1; *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 5(2)(a) and (b), 206(b), 207(a), and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(a) and (b), 306(b), 307(a), and 308(a), are set forth verbatim in Appendix D hereto.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141, may authorize Railway Express Agency, Inc., a wholly-owned railroad subsidiary, to conduct motor common carrier operations not restricted to traffic having an immediately prior or subsequent movement by rail?

2. Whether the District Court correctly concluded that the Commission had made a finding of "special circumstances" justifying motor operations by a railroad affiliate without a "rail-haul" restriction?

3. Whether the Commission, under Section 5(2)(b) of the Interstate Commerce Act and the national transportation policy, may treat Railway Express differently than other rail-affiliated motor carriers and authorize it to perform motor operations functionally unrelated to those of its rail parents?

4. Whether the Commission, under Section 207 of the Interstate Commerce Act, may find that the public convenience and necessity require operations by the rail-subsidiary applicant as a common carrier by motor vehicle of "general commodities moving in express service," although refusing to apply its long-standing definition of "express service" to the proposed service?

5. Whether the Commission, despite its uniform and long-standing interpretation of the "rail-haul" restriction contained in numerous motor carrier certificates issued to railroads and their affiliates, may lawfully change that interpretation so as to bestow upon Railway Express, as to hundreds of certificates already issued, greatly enlarged operating rights?

STATEMENT

Railway Express Agency, Inc., hereinafter called REA or Railway Express, is a Delaware corporation organized by the principal railroads of the country in 1928; its capital stock is wholly owned by such railroads; and it operates under an agreement to which most of the country's railroads, including the owning railroads, are parties. REA engages in substantial operations by motor vehicle in the pickup, delivery, transfer, and line-haul movement of express throughout the United States, utilizing in excess of 12,000 motor vehicles in such operations. Appendix B, p. 45, *infra* Since the 1939 decision of the Commission in *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161, establishing which of its motor vehicle operations fall within certain of the partial exemptions and which are subject to full economic regulation under part II of the Interstate Commerce Act, Railway Express had filed, at the time of the Commission's report herein, approximately 1,700 applications for motor carrier authority, 254 of which were filed in 1960 and 1961. Appendix B, p. 54, *infra*

By a series of five applications filed under Section 206(b) of the Interstate Commerce Act, 49 U.S.C. § 306 (b), Railway Express sought authority from the Interstate Commerce Commission (Commission) to engage in transportation in interstate and foreign commerce as a common carrier by motor vehicle of general commodities, including class A and B explosives, moving in express

service, over designated regular routes in Massachusetts, New Hampshire, Vermont, Maine, and New York, as more fully described in the appendix to the Commission's decision, which is appended hereto as Appendix B.

After hearing, each of the applications was the subject of a favorable report and recommended order by a Joint Board or Hearing Examiner, and exceptions were duly taken by various appellants here. American Trucking Associations, Inc., the appellant association, was permitted to intervene in these proceedings at various stages.

Three of the applications (Sub-Nos. 1577, 1594, and 1595) were the subject of a single report and order of division 1 of the Commission, Appendix C hereto, and, on petition by protestants therein, the Commission reopened those proceedings on its own motion and assigned all five proceedings for oral argument. By its report and order dated October 5, served October 24, 1962, Appendix B hereto, the Commission authorized Railway Express to perform transportation as a common carrier by motor vehicle of general commodities moving in express service, over the routes and between the points sought, subject to certain conditions.[2]

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[2] The authority granted in MC-66562 (Sub-Nos. 1515, 1577, 1594, and 1595) was made subject to conditions 1-4 below, and the authority granted in MC-66562 (Sub-No. 1687) was made subject to conditions 1, 3, 4, and 5 below.

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.
2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.
3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the the date of the certificate.
4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary

The District Court dismissed the complaint of appellants, finding that the order of the Commission is supported by substantial evidence and is in accord with the mandate of the Interstate Commerce Act, and that the Commission was not required to include in the certificates a restriction limiting transportation thereunder to shipments having a prior or subsequent movement by air or rail.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding involves more than the grant of five applications of Railway Express to perform unrestricted motor carrier operations; it is recognized by all parties as a representative proceeding which will set the pattern for future motor carrier grants to Railway Express. The prefatory paragraph of the Commission's report characterizes the importance of this proceeding:

> The performance of express service by motor vehicle has long presented unique regulatory issues. Pending before us is a large volume of applications by applicant (REA) seeking authority to operate as a common carrier by motor vehicle of general commodities moving in express service. These five applications, representative of numerous others, present the broad regulatory problem of defining generally the circumstances in which, and the conditions and limitations under which, applicant properly may be allowed to engage in such operations. The character of the services now provided and here-

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to or supplemental of express service of the Railway Express Agency.

5. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement in express service of the Railway Express Agency.

> in proposed to be rendered by REA has generated unusual interest throughout the independent motor carrier industry generally, and existing motor common carriers of general freight have expressed recently a growing concern over REA's "invasion of the field of motor carrier operations." In these circumstances, we deem it necessary and desirable to utilize the instant proceedings as a vehicle for the reappraisal and restatement of the requirements and policies which we believe should obtain with respect to grants of motor carrier operating rights to REA. Appendix B, pp. 40-41, *infra*

Nor is it only future grants of motor carrier operating authority to Railway Express which will be affected by this decision. For the first time in its report here, the Commission has substantially relaxed the definition of the "rail-haul" condition[3] attached to numerous outstanding Railway Express motor carrier certificates and, as a result and without any evidence of public need for additional service, has authorized operations thereunder of greatly increased scope.

1. The National Transportation Policy states a Congressional purpose to recognize and preserve the inherent advantages of each mode of transportation, and in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 428 (1951), this Court noted with approval the Commission's application of that policy "so as to read the proviso [of § 5(2)(b)] into § 207 in order to preserve the inherent advantages of motor-carrier service." The proviso of § 5(2)(b) forbids the approval of acquisitions by railroads or railroad affiliates of motor carrier operations except on a finding by the Commission, among others,

[3] "[A] requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail." Appendix B, p. 65, *infra*

that the proposed transaction will enable the railroad "to use service by motor vehicle to public advantage *in its* [rail] *operations.*" The emphasized phrase has been translated by the Commission as empowering it to authorize rail operations of motor vehicles "confined to service auxiliary and supplementary to that performed . . . in its rail operations," *Pennsylvania Truck Lines, Inc.—Control —Barker*, 1 M.C.C. 101, 113 (1936), but not permitting approval of all-out truck service competitive with that of independent motor carriers or that of the railroads themselves.

This Court recently summarized the present state of the law with respect to motor carrier operations by railroads in *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1, 7 (1960), hereinafter called the *A.T.A.* case, and concluded:

> Thus it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law. Moreover, this general policy fortunately has not been implemented merely by way of a more or less unguided suspicion of railroad subsidiaries, but rather has evolved through a series of Commission decisions from embryonic form into a set of reasonably firm, concrete standards. [Footnote omitted]

Even though the clear Congressional policy, with one exception noted hereinafter, limits motor carrier operations of railroads to those usable to public advantage in their rail service, the Commission here decided to approve grants of motor carrier authority without such restrictions on the theory that Railway Express stands in a different posture from other rail-affiliated motor carriers because it operates as an express company. The Commission stated the rationale of its decision as follows: "while the motor carrier operations of a railroad or its

subsidiary must be auxiliary to or supplemental of rail service, REA's motor carrier service is auxiliary to or supplemental of its *express* company service." Appendix B, p. 67, *infra* The Commission cited no statutory basis for the distinction it made between Railway Express and other rail-affiliated motor carriers, nor could it since the policy was designed to limit railroads to motor carrier operations usable in their *rail* operations. Neither did the Commission point to any decisional precedents for such a distinction, although it retrospectively assigned significance to certain variations in the language of the restrictions, and sought to rationalize the absence of cases recognizing the distinction by stating that Railway Express cases "lack the comprehensive discussions of the restrictions found in the [usual rail-affiliate decisions], leaving, in fact, a void as to certain specifics illuminative as to the meaning of the REA restrictions." Appendix B, p. 66, *infra*

The one exception to the rule against Commission approval of unrestricted motor-carrier operations by a railroad or a railroad affiliate is the "special circumstances" test, and what constitutes such special circumstances is spelled out in *Rock Island M. Transit Co. Com. Car. Application*, 63 M.C.C. 91, 102 (1954), aff'd 355 U.S. 141 (1957): To receive unrestricted authority, the rail affiliate must not only establish that the grant of authority has not and will not result in undue restraint of competition, but it must also prove "that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience."

2. The District Court's affirmance of the grant of certificates without rail-oriented restrictions was not based on the Commission's theory of the unique position of Railway Express, but rather was grounded on the "special circumstances" test: "In this proceeding the Commission

has in fact found the necessary special circumstances." Appendix A, p. 36, *infra* But when reference is made to the portion of the Commission's report cited by the Court (91 M.C.C. at 340, Appendix B, p. 83, *infra*), it is clear, although the Commission's language is not so trenchant as could be desired, that it did not make a finding that "special circumstances" exist which justify granting the authority sought without the auxiliary-and-supplemental-to-rail restrictions.

The portion of the report cited by the Court begins at 91 M.C.C. 339, Appendix B, p. 82, *infra*, with the statement by the Commission that the implementation of the policy expressed in § 5(2)(b) is "designed to relate properly the motor vehicle operations authorized to the operations of the rail *or rail-controlled* carrier on whose behalf they are conducted." This represents a gross overstatement of the purposes of the policy expressed in § 5(2)(b) and it would nullify the Congressional intent stated in the National Transportation Policy, to "recognize and preserve the inherent advantages of" each mode of transportation. The Commission stated the purpose as permitting the relation of the rail affiliate's operations to the operations of the rail affiliate: but this is no limitation. Even assuming that a thing can be auxiliary to or supplemental of itself, limiting the motor operations of Railway Express to Railway Express's operations will not prevent "railroad incursions into the field of motor carrier service," which this Court stated, in the *A.T.A.* case, *supra*, at 364 U.S. 7, as the purpose of the policy. The correct means of implementing that policy was stated by the Court in the *A.T.A.* case at 364 U.S. 9:

> The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5(2)(b) that the carrier should be able "to use service by motor vehicle to public advantage

> *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of trucking, and, under normal circumstances, the National Transportation Policy is thereby offended.

Basing its reasoning on its misapprehension of the scope of the statutory language, the Commission concluded that the motor vehicle operations of Railway Express must relate to its activities as an *express company*. Then it stated:

> When REA seeks to institute motor vehicle operations which are not auxiliary to or supplemental of those of the express company then, for it to succeed, it must show that special circumstances exist. For example, if REA should seek to render an irregular-route service, which service, as we have noted, has not been considered to be in the nature of an express service, it would appear that special circumstances would have to be shown in order for such application to be granted. Also, because the express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for REA to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist. Appendix B, p. 83, *infra*

It is evident that the Commission was not making a finding of "special circumstances" in the sense of the *Rock Island* test, *supra*. Its decision to grant authority without the usual rail-oriented restrictions was predicated on the conclusion that those operations must relate, not to the rail operations of the owning railroads, but to the operations of the *express company*. Only incidentally did it refer to Railway Express's railroad affiliation, and not as a basis for approval of the grants in the form made. Even in this respect, however, it stated the law more broadly

than it has been developed through the line of Commission and court decisions, since it spoke of special circumstances justifying motor operations "wholly disassociated from rail operations," whereas past decisions require "special circumstances" to be shown to justify *any* relaxation of the "auxiliary to and supplemental of rail operations" standard.

The Commission's discussion of the restrictions used to implement the anti-monopoly policy emphasizes that the grants here were based on the supposed unique position of Railway Express rather than on "special circumstances" in the *Rock Island* sense. Thus, it said:

> The emphasized words [in certain of the restrictions] are symbolic of the difference between the purpose of the REA restrictions and the purpose of the corresponding restriction shown in the PMT illustration above: while the motor carrier operations of a railroad or its subsidiary must be auxiliary to or supplemental of rail service, REA's motor carrier service is auxiliary to or supplemental of its *express* company service. Appendix B, p. 67, *infra*

And specifically with respect to the "rail-haul" restriction, the Commission refused to apply its long-standing interpretation that such a restriction requires an *immediately* prior or subsequent rail movement, even where the word "immediately" is not included in the restriction,[4] but rather concluded that Railway Express certificates containing such a restriction may be "tacked" together, provided only that "the traffic thereunder is not transported in a wholly motor movement." Appendix B, p. 72, *infra*

Summarizing its discussion of the meaning of the restrictions in Railway Express certificates, the Commission

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[4] *New England Transp. Co. Extension—Cement*, 88 M.C.C. 703, 706 (1962); *Reading Transp. Co.—Control and Merger—Karn's Transfer Co.*, 93 M.C.C. 11, 19 (1963).

stated that it is not accurate to refer to Railway Express's motor operations as substituted motor for rail service, "for what REA is actually performing is a line-haul motor vehicle operation on its own behalf to replace train service which it, as an express company, formerly utilized." Appendix B, p. 73, *infra*[5] That is, the test is not whether the motor operations are usable in the parents' rail operations as the statute requires, but whether they are usable in the affiliate's operations as an express company. If the statute is construed to mean that rail affiliates' motor service need only be restricted to that auxiliary to or supplemental of the affiliates' service, the statute is not only meaningless, but the supposed protection against railroad invasion of the field of motor carrier service is written out of the Act. But this is the clear basis of the Commission's decision here for it stated that the operations it was approving "are completely in conformity with the concept of express service, upon which concept we would turn our backs if we were to interpret the rail-haul restriction as requiring literally a complete prior or subsequent movement over steel rails," and concluded, "It is, perhaps, thus unfortunate that many of REA's certificates were obtained in circumstances that prohibit the traffic involved to move wholly free of the rail service with which it was proven to be associated; but we are powerless here to remedy that situation." Appendix B. p. 73, *infra*

Contrary to the District Court's conclusion, the Commission did not base its grant of motor carrier authority

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[5] This reasoning is strikingly similar to that used by the Commission in awarding unrestricted trucking rights to a railroad's motor subsidiary, which action was reversed by this Court's decision in *A.T.A.*: "On the other hand, insofar as Southern Pacific points are concerned, the authority sought represents no more than a request by the Southern Pacific to perform truck transportation, albeit contract-carrier transportation, to the same points it serves as a rail carrier." *Pacific Motor Trucking Co. Extension—Oregon*, 77 M.C.C. 605, 620 (1958).

without rail-oriented restrictions on any finding of special circumstances in the *Rock Island* case sense. The mention of the special circumstances test cited by the District Court to support its conclusion apparently was part of the "guidelines" being drawn for future application in Railway Express cases.[6] Appendix B, p. 85, *infra* And the lower court should not have assumed that special circumstances exist in the absence of a proper finding by the Commission, *A.T.A.* case, *supra*, at 364 U.S. 13-14, since "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities and Exchange Com.* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).

Despite its recognition that the principles set out in its opinion could "greatly facilitate the expansion of REA operations by motor vehicle," Appendix B, p. 83, *infra*, the Commission concluded that Railway Express motor vehicle operation in the manner indicated does not appear to present any real threat of undue competition to the operations of independent motor carriers generally,[7] while the diminution of expedited rail service does pose a threat to the continued existence of a nationwide express service. Appendix B, p. 85, *infra* But this conclusion fails to

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[6] Even assuming, *arguendo*, that the Commission found "special circumstances" in that there is a public need for some express service which the existing independent motor carriers are unable to meet because of commodity limitations in their certificates, such a finding would not accord with the Congressional policy. Having never authorized the independent motor carriers to perform the service, unlike the situation in the *Rock Island* case, the Commission can hardly complain that they are "unwilling" to perform it.

[7] On this point, the District Court referred to the Commission's expressed willingness to review Railway Express cases for undue competition and suggested that the future conditions limitation will furnish protection. Appendix A, p. 37, *infra* But, as this Court pointed out in the *A.T.A.* case, at 364 U.S. 12, such a condition "obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service."

take account of the ownership of Railway Express by the railroads. Under the Commission's conclusion here, a railroad may cut down on its rail service and thereby create the situation entitling its affiliate to additional motor vehicle authority. The lack of any real *public* need for this service by Railway Express is perhaps best exemplified in the Sub-No. 1515 proceeding where Railway Express seeks motor carrier authority to replace, not discontinued rail service, but the motor service of a railroad affiliate which has replaced its parent's discontinued train service. Appendix B, p. 46, *infra* The Commission's report fails completely to discuss or even recognize the inconsistency of discontinuing train service for lack of need, including presumably the need of Railway Express, and yet granting motor authority because of the supposed public need for expedited service such as was discontinued. The Commission's report, if not reversed, will legitimatize this railroad "boot-strap" procedure whereby their own action in discontinuing rail service will justify the grant of additional motor carrier authority to their nationwide affiliate.[8]

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[8] It must be emphasized that elimination of rail passenger service is not the only reason for the recent flood of Railway Express motor carrier applications. In MC-66562 (Sub-No. 1903), *Railway Express Agency, Inc., Ext.—New London, Ohio*, the Joint Board's report served February 4, 1963, aff'd by unprinted Decision and Order of the Commission, May 13, 1963, also approved a certificate without rail-haul restrictions based on a reduction of motor service by a rail-affiliated motor carrier. In MC-66562 (Sub-No. 1902), *Railway Express Agency, Inc., Ext.—Henniker, N.H.*, (1963) (not printed), pending on petition for reconsideration, Railway Express seeks a certificate to replace a less desirable *motor* authority it now has and to replace the motor service of another railroad affiliate. In MC-66562 (Sub-No. 1869), *Railway Express Agency, Inc., Ext.—Buffalo*, pending on exceptions to the Examiners' report, the passenger train was not discontinued, but only the express car was dropped from it. In MC-66562 (Sub-No. 1754), *Railway Express Agency, Inc., Ext.—Winchester, Va.* (1963), pending on petition for reconsideration, and in MC-66562 (Sub-No. 1786), *Railway Express Agency, Inc., Ext.—Huntingburg* (1963) (not printed), the basis of the applications was dissatisfaction

3. One effect of the Commission's new construction of the restrictions usually placed in the certificates of railroad affiliates, is to enlarge the operations authorized in outstanding certificates containing such restrictions. Until this report, such a restriction has been interpreted as requiring an immediately prior or subsequent movement over steel rails, *supra*, n. 4, and motor operations so restricted were thus confined to those auxiliary to or supplemental of the rail operations which they feed. Now, for the first time, the Commission concluded that the restriction only requires that the traffic moved thereunder is not transported in a wholly-motor movement. Railway Express has a nationwide network of motor carrier authorities, many of which contain a rail-haul restriction. Under this new interpretation, numerous authorities containing such restrictions may be "tacked" together, permitting substantial line-haul highway movements, provided only that some small segment of the total movement is over steel rails. In many cases, in a complete perversion of the purposes of the Congressional policy, the rail operations will become auxiliary to and supplemental of the motor operation.

This is not mere speculation about possible far-distant future conditions, since, although this record contains no actual count of outstanding Railway Express certificates, it notes that from 1939 to the time of the proceeding before the Commission, Railway Express has filed approx-

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with existing train schedules. In *Railway Exp. Agency, Inc., Ext. —Sioux City-Mitchell*, 91 M.C.C. 836, 838 (1963), the Commission approved the application after finding that Railway Express's "dissatisfaction with [the train] service as well as its opinion that it could provide a more economical and efficient service by motor occasioned the instant application as well as that for the temporary authority under which it presently operates." In view of this Court's recent expressions in this area, it is hard for us to swallow the proposition that one rail subsidiary, Railway Express, should receive unrestricted motor-carrier rights because other rail motor subsidiaries, or other railroads themselves, render less than an adequate transportation service.

imately 1,700 applications for motor carrier authority, Appendix B, p. 54, *infra*, and several hundred certificates have been granted. As to the tacking possibilities, the report notes that, of the 34 points proposed to be served under the five authorities in issue, 14 are service points common to 37 other certificates now held by Railway Express. Appendix B, p. 41, *infra*

This enlargement of operations permitted under outstanding certificates would be accomplished without any showing as required by § 207(a) of the Act, 49 U.S.C. § 307(a), that the present or future public convenience require the service Railway Express will be permitted to perform.

4. While recognizing that the meaning of the term "general commodities moving in express service" is basic to a consideration of Railway Express's operations, the Commission failed to apply the meaning which it gave to the operations proposed. The correct application of the term "express service" to the proposed operations is essential both in deciding whether, under § 207(a) of the Act, 49 U.S.C. § 307(a), the proposed service is required by public convenience and necessity, and in determining whether special circumstances exist to justify unrestricted motor operations within the meaning of the *Rock Island* case test, *supra*: "that the public interest requires the proposed operation, which the authorized independent motor carriers have not furnished except where it suited their convenience."

The Commission reviewed the history of this term which it stated it has always thought of as connoting certain distinct characteristics. The term "express service" has been defined with remarkable consistency through the line of Commission and court decisions and, as the Court noted, Appendix A, p. 30, *infra*, appellants here did not quarrel with the definition assigned by the Commission, and do not do so now. However, to avoid misunderstanding,

it should be noted that the Court followed the quotation of the Commission's definition with that agency's conflicting statement that "express service is not susceptible of precise definition" because its attributes must be judged in comparison with the services and rates of ordinary freight carriers. Appellants concurred in the Commission's definition of "express service;" they did not and do not concur in the Commission's caveat that the term cannot be precisely defined.

The Commission refused, on the ground of lack of need, to restate the definition of "express service" so as to set at rest any question whether there is an unsatisfied public need for the service that Railway Express proposes. But, based apparently on its assumption that the term cannot be precisely defined, the Commission also refused to apply the long-standing definition of "express service" to the operations which Railway Express proposes to perform. The Commission's treatment of this problem is exemplified by contrasting certain statements in its report. At Appendix B, p. 56, *infra*, it quoted from *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114 (1942), to describe the "distinct characteristics" of express service:

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. This service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services . . . speed in handling is one of the principal characteristics of express service. . . .

But at p. 84, the Commission stated:

> We do not view favorably the argument generally made by common carriers of ordinary freight that an REA application for motor carrier operating authority should turn on a showing by REA that it will transport over the route involved a significant number of commodities requiring, by nature, special handling. This argument loses sight of the fundamental function of an express service. It is a premium service utilized by shippers whenever speed or special handling, rather than rates, are of importance.

Nowhere in the report does the Commission explain how a contention that there must be a showing of need for "special handling" conflicts with a test of need for "speed or special handling."

And at p. 85, dealing specifically with the Sub-Nos. 1515 and 1687 applications, the Commission said:

> While much of this traffic is, as pointed out by certain protestants and by ATA in their respective exceptions, not traffic which inherently requires special handling of the type excluded from the authorities of, or otherwise not normally handled by, the protestants, it is, nevertheless, traffic which we may judge to be bona fide express traffic through its movement, in the past, in applicant's premium service.

But there is no finding by the Commission, nor is there any evidence in the record to support a finding, that Railway Express's past service over the routes involved was premium express service.

The treatment of the question of "premium rates" by both the Commission and the Court exemplifies their approach to the question whether Railway Express is performing or proposing to perform an express service. Early in the history of regulation of express service, the Commission recognized that it is a service superior to that furnished by ordinary freight carriers and contemplating, as it did, the expedited handling and transportation of

comparatively small shipments, it is a premium service commanding premium rates. The attribute of premium service at premium rates has always been one of the indicia of true express service. In the quotation from the *Durant-Koscuisko* case, *supra*, the Commission noted that the fact that express service can and does survive in competition with "general freight service conducted generally at lower rates" is indicative of the inherent differences between the two services. In *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363, 371 (1941), express service was described as "an expedited form of transportation for which the shipper pays a premium rate whenever time and security, rather than rates, are of primary importance."

In *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 582 (1955), summarizing the attributes of express service, the Commission said, in part:

> It is readily apparent in the foregoing summary that express carriers provide additional services under less favorable operating conditions than do carriers providing ordinary freight services. In the circumstances it follows that the level of their rates for express service is necessarily higher. The fact that express carriers, charging premium rates, are able to compete with and survive the competition of the carriers providing an ordinary freight service confirms the higher type of service expected of, and supplied by them. Thus while premium rates are, of course, not part of the service of express carriers they nevertheless are an attribute of such service without which it is unlikely that any service should be so classified.

The Commission and the Court both treated appellants' references to the rates for the services involved as an attack on the legality of Railway Express's rates, rather than as one of the elements of the definition of express service to be applied to determine whether the service proposed is, in fact, premium express service.

Numerous supporting shipper witnesses admitted that their support of Railway Express was to secure lower rates, but the Commission, with District Court approval, refused to consider this evidence as indicative that what Railway Express is performing and proposes is not express service but ordinary freight service. At oral argument before the Commission, appellants sought to have the Commission take official notice of rate evidence in its official files, but the Commission refused to consider this material.

Plaintiffs' brief to the District Court cited a number of Railway Express tariffs then on file with the Commission to show that the agency had available in its own official records evidence that Railway Express seeks to render service on shipments up to 20,000 pounds at rates at or below the level of rates of the general freight carriers.[9] This is evidence of which the Commission can and should take official notice. *Joynes* v. *Pennsylvania R. R.*, 17 I.C.C. 361, 366 (1909). It is evidence within the Commission's own knowledge that Railway Express is holding out ordinary-freight rates for what must be presumed to be ordinary-freight service. *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 576, 582 (1955). The Commission cannot be allowed to so compartmentalize its knowledge that when it sits in rate proceedings, it has certain information available to it, and when it hears application cases, it has other information available, but the two funds of information are never intermingled. This is completely contrary to the *Joynes* case doctrine that the Commission has a right of official notice which extends "to the entire range of its experience with transportation problems and embraces all the knowledge that it has gathered from any source." The Commission's duty to utilize information within its experience and knowledge

[9] E.g., Railway Express Commodity Tariff 33-B, I.C.C. No. 8550, effective August 1, 1962; Supplement 19 to Railway Express Tariff 37, I.C.C. No. 8499, effective March 31, 1963; Supplement 2 to Railway Express Tariff 44, I.C.C. No. 8513, effective January 7, 1963.

to carry out the Congressional scheme of transportation regulation is part and parcel of that "expertise" which justifies agency regulation.

In this decision, the Commission refused to measure the proposed service against its long-standing definition of express service. In disclaiming ability to state a precise definition of that term, the Commission conceded that its "attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight." But the Commission refused even to apply this comparative test to determine whether the proposed service is truly superior to that provided by the ordinary freight carriers.

5. As a result of the Commission's decision, the independent general freight carriers are faced with the competition of a nationwide motor carrier, financed by the major railroads of the country, and unrestrained by any meaningful restriction on the operations which it will be able to perform. The Commission's refusal to apply its long-standing definition of express service to the operations proposed is contrary to the provisions of § 207, 49 U.S.C. § 307, requiring proof that the public convenience and necessity require the operations proposed. This refusal to test the proposed service against the recognized definition also precludes the existing independent carriers from showing that no "special circumstances" exist within the meaning of the *Rock Island* test, *supra;* since, unless the proposed service is measured against and shown to be different from and superior to the service they perform, the independent carriers are barred from showing that they are, in fact, meeting all reasonable public need.

The Commission's novel theory that Railway Express should be treated differently from other railroad affiliates in passing on its applications for new motor carrier authority will, if sustained by the Court, completely nullify the Congressional intent to recognize and preserve the inherent advantages of motor carrier service by restricting

entry into that field of transportation to the railroads. While the Commission and the courts have recognized the continuing validity of that policy with respect to the motor operations of individual railroads and railroad affiliates and have limited their motor operations in relatively circumscribed areas to services auxiliary to and supplemental of the parents' rail operations, the Commission would here abnegate the policy as to the nationwide affiliate of the country's major railroads collectively. If this decision is allowed to stand, there will be little need for individual railroads to seek motor carrier authority since they will have a nationwide motor carrier affiliate, unrestricted to auxiliary and supplemental operations, engaged in general commodity general freight service in direct, all-out competition with the existing independent motor carriers.

This is the real vice of the Commission report. Where, because of its multiple-rail affiliation, the anti-monopoly policy should be applied even more zealously, it is relaxed to the point of ineffectuality.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard R. Sigmon, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the third day of January, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., to Robert B. Hummel, Chief, Appellate Section, Anti-Trust Division, Department of Justice, Washington 25, D. C., and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

2. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Railway Express Agency, Inc., intervening defendant, by mailing copies, in duly-addressed envelopes, with postage prepaid, to William J. Taylor and William H. Marx, Esqs., 219 East 42d Street, New York 17, New York, and to J. Joseph Maloney, Jr., Esq., 31 Milk Street, Boston 9, Massachusetts.

RICHARD R. SIGMON

APPENDIX A

AUCLAIR TRANSPORTATION, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

Civ. A. No. 62-927.

United States District Court
D. Massachusetts.
Sept. 6, 1963.

OPINION

Before HARTIGAN, Circuit Judge, and GIGNOUX and CAFFREY, District Judges.

CAFFREY, District Judge.

This is an action in which petitioners seek to set aside and enjoin a report and order of the Interstate Commerce Commission entered on October 5, 1962 granting intervenor-defendant Railway Express Agency, Inc. (REA) five certificates of public convenience and necessity authorizing REA to operate as a common carrier by motor-vehicle in interstate or foreign commerce of general commodities moving in express service over regular routes between designated points in several of the New England States subject to specified conditions. Jurisdiction of this Court is invoked under 49 U.S.C.A. § 305(g), 5 U.S.C.A. § 1009, and 28 U.S.C.A. §§ 1336, 1398, 2284, and 2321 to 2325.

The facts giving rise to this case are set out on pages 2 through 5 of this opinion and are taken from pages 3 through 6 of Brief of Plaintiffs.

STATEMENT OF THE CASE

By a series of five applications filed under Section 206 of the Interstate Commerce Act, 49 U.S.C. § 306, Railway Express, a Delaware corporation organized by the principal railroads of the country in 1928, and the capital stock of which is wholly owned by such railroads, sought authority from the Commission to engage in transportation in interstate and foreign commerce as a common carrier by motor vehicle of general commodities, including class A and B explosives, moving in express service, over designated regular routes, as follows:

> Sub-No. 1515—(1) between Boston, Mass., and Manchester, N. H., serving the intermediate points of Nashua, N. H., and (2) betwen Boston, Mass. and Dover, N. H., serving the off-route points of Newburyport, Mass., and Hampton, N. H., and the intermediate point of Portsmouth, N. H.;
>
> Sub-No. 1577—(1) between White River Junction, Vt. and Whitefield, N. H., serving the intermediate points of Fairlee and Bradford, Vt., and Woodsville and Littleton, N. H., and (2) between Wells River and Newport, Vt., serving the intermediate points of St. Johnsbury, Barton, and Orleans, Vt.;
>
> Sub-No. 1594—between Manchester, N. H., and White River Junction, Vt., serving the intermediate points of Concord, Potter Place and Lebanon, N. H.;
>
> Sub-No. 1595—between Boston, Mass. and Portland, Maine, serving no intermediate points; and
>
> Sub-No. 1687—between Hoosick Falls, N. Y., and Middlebury, Vt. serving the intermediate points of North Bennington, Arlington, Manchester, Danby, Rutland, Proctor, Brandon, Ludlow, and Chester, Vt.

Separate hearings were held on these applications at various times between November 5, 1959 and February 16, 1961, at which the various motor carrier plaintiffs whose interests were affected appeared in protest and presented evidence. Each of the applications was the subject

of a report and recommended order by a Joint Board or Hearing Examiner, and exceptions were duly taken by various plaintiffs.

American Trucking Associations, Inc., the plaintiff association, was permitted to intervene in these proceedings at various stages.

Three of the applications (Sub-Nos. 1577, 1594 and 1595) were disposed of by a single report and order by Division I of the Commission. Plaintiffs who were protestants in those proceedings petitioned for reconsideration and, by order dated November 20, 1961, the Commission reopened those proceedings on its own motion and assigned all five proceedings for oral argument. Consolidated oral argument on the five proceedings was had before the full Commission on January 16, 1962. On October 24, 1962, the Commission served its report and order dated October 5, 1962 (Complaint, Appendix A) complained of herein.

In substance, the report and order authorizes REA to operate in interstate or foreign commerce as a common carrier by motor vehicle of general commodities moving in express service between the points and over the routes requested in the applications, subject to certain conditions. The authority granted in MC-66562 (Sub-Nos. 1515, 1577, 1594 and 1595) was made subject to conditions numbered 1-4 below, and the authority granted in MC-66562 (Sub-No. 1687) was made subject to conditions 1, 3, 4 and 5 below.

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.
2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.
3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives,

shall be limited, in point of time, to a period expiring 5 years from the date of the certificate.

4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary to or supplemental of express service of the Railway Express Agency.

5. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement in express service of the Railway Express Agency.

Aside from, but basic to, the question of the existence of a public need for the proposed services, the issues before the Commission concerned "the broader legal and policy questions surrounding" Railway Express's operations. The basic positions of the parties was well summarized by the Commission:

> In these respects it is the basic position of protestants and ATA that REA is embarked upon a program of converting its operations from those in the nature of true express service performed principally in connection with rail or air service, to those in the nature of nationwide general freight operations by motor vehicle unrelated to the rail operations of REA's sponsors, in competition with, and to the detriment of, existing common carriers of general freight; and that in pursuing and fulfilling this goal REA, because it is wholly owned by railroads, is in contravention of the National Transportation Policy and the policy of Section 5(2)(b) of the act against wholesale incursions by rail affiliates into the motor carrier field. REA's position is, in essence, that it simply seeks here to provide the same services by motor vehicle exclusively that it formerly was able to make available in connection with the use of passenger train service; and that the proposed services, to be operated without any prior or subsequent movement

by rail, but with other rail-connected restrictions, in the circumstances here shown would not be an unwarranted or excessive separation from the essential nature of its overall operations as an express company. The underlying theme of REA's position appears to be that it has always provided, and here seeks to continue, the unique service of an express company which common carriers of general freight in almost every instance cannot provide equally well; and that the public, which has relied traditionally upon REA for the handling of both localized and nationwide express movements, should not be deprived thereof only because of the curtailment or discontinuance of rail passenger service which REA had been able to utilize formerly in the performance of such service.

Before this Court plaintiffs urged that the Commission erred in finding that the present and future public convenience and necessity required the operations proposed by REA in the applications involved; that the Commission erred in granting the certificates without attaching thereto conditions limiting the transportation thereunder to shipments having a prior or subsequent movement by rail or air (the so-called rail-haul restriction); that the Commission erred in concluding that the condition requiring a prior or subsequent movement by rail or air in *outstanding* REA certificates only requires that traffic moved thereunder be not transported in a wholly motor movement; and that the Commission's interpretation of the "rail-haul" restriction modified the outstanding motor carrier certificates of REA in violation of 49 U.S.C. §§ 306, 307.

I. THE ORDER OF THE COMMISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS IN ACCORD WITH THE MANDATE OF THE INTERSTATE COMMERCE ACT.

[1] The Interstate Commerce Commission has been charged by Congress with the obligation to decide whether

and when additional motor carrier service would serve "the present or future public convenience and necessity," Interstate Commerce Act, § 207(a), 49 U.S.C. § 307(a). In the performance of that obligation the Commission has been entrusted with a wide range of discretionary authority, Interstate Commerce Commission v. Parker, 326 U.S. 60, 65, 65 S.Ct. 1490, 89 L.Ed. 2051 (1945). Each case "entails not only a weighing of evidence by the Commission but also the exercise by it of an expert judgment on the intricacies of the transportation problems involved." A. B. & C. Motor Transportation Co. v. United States, 151 F.Supp. 367, 371 (D.Mass.1956).

The Commission's report in the instant case defined "express service" to mean

> "generally the expedited handling of small parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges."

and went on to observe:

> "From this view it follows that express service is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by conmmon carriers of ordinary freight." Railway Express Agency, Inc. Extension-Nashua, N. H., 91 M.C.C. 311, 324 (1962).

At oral argument the plaintiff motor carriers indicated that their quarrel was not with this definition, which has long been well-recognized in the transportation industry, see Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955), but with the Commission's finding that the evidence showed a public need

for such service. This argument was made in the face of voluminous evidence that there is such a need. Plaintiffs do not dispute the finding of Division 1 adopted by the Commission that the service proposed by REA is a continuation of service which it previously had rendered utilizing now-discontinued rail passenger trains; e.g., Railway Express Agency, Inc. Extension-Newport, Vt., 84 M.C.C. 435, 441 (1961) adopted 91 M.C.C. 311, at 315 and 342 (1962). Plaintiffs also agree that the evidence reveals a substantial amount of express traffic is presently moving (under temporary motor-carrier authority granted to REA) from and to points on the routes involved. 84 M.C.C. at 441, 91 M.C.C. at 341. Moreover, the record contains extensive testimony of shippers relative to their need for an express service like that proposed to be continued by REA, to which the Commission also adverted. 91 M.C.C. at 316, 318, 341; 84 M.C.C. 438-439, 441, adopted 91 M.C.C. at 342. An example of the type of transportation service which the shippers desired is illustrated by the Commission's findings with respect to the application in No. 1515. The Commission states at p. 316:

> "The application is supported by 14 shippers, 11 of whom are located at or near proposed service points along the routes involved, and 3 of whom are located at the communities of Hooksett and Somersworth, N. H., and South Berwick, Maine, which points are conceded by REA not to be within the commercial zones of any of the involved service points. This distinction aside for the moment, the 14 shippers collectively receive and ship from and to various points in the United States and those in other countries articles such as electronic equipment, shellfish, garments, silverware, office equipment, advertising material, eggs, baby chicks, and art work. The shellfish and eggs are of a perishable nature and require special care when transported, and the silverware and some of the electronic equipment and re-

> lated parts require armed surveillance. All of the shippers have used applicant's service for the expeditious and special handling provided, which they desire to have available permanently; and a few use additionally the services of motor common carriers, principally for their large volume shipments, and parcel post and air express for other small shipments."

Similar evidence was adduced in the other four applications; see, e.g., findings of Division 1, 84 M.C.C. at pp. 438, 439. The Commission relied on this testimony (specifically excluding from consideration the testimony of the three shippers not located at the involved service points, 91 M.C.C. at 341) plus exhibits introduced into the record which showed the type and amount of express traffic moving over the routes involved, in reaching its conclusion as to the need for the grant of the certificates.

Turning to the service being rendered by plaintiffs the Commission found that it fails to meet the existing need. Plaintiffs concede that their certificates do not permit them to transport commodities of unusual value, and do not challenge the finding that they have to date shown no willingness to perform express service of any kind. 91 M.C.C. at 341. Their argument that they should be given "a reasonable opportunity to meet the need" (Brief for Plaintiffs, p. 52), was answered by the Supreme Court in United States v. Detroit & Cleveland Navigation Co., 326 U.S. 236, 241, 66 S.Ct. 75, 77, 90 L.Ed. 38 (1945), wherein Mr. Justice Douglas said:

> "(The Commission's) doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. * * * Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of

> their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here."

[2, 3] Even assuming *arguendo* that the plaintiffs are presently able to provide the unique express service required by shippers, this factor alone would not bar the Commission from certifying additional service. Norfolk Southern Bus Corp. v. United States, 96 F.Supp. 756, 761 (E.D.Va.1950), aff'd. per curiam 340 U.S. 802, 71 S.Ct. 68, 95 L.Ed. 590 (1950). Plaintiffs have no vested right to be immunized against competition. A. B. & C. Motor Transp. Co. v. United States, 69 F.Supp. 166, 169 (D.Mass.1946).

[4] Finally, it is urged that the Commission erred in failing to consider whether REA's rates were in fact premium rates before granting the certificate. In this instance the Commission followed a long-settled and judicially approved procedure in holding that the proper place to test the legality of REA's rates was in a complaint proceeding under 49 U.S.C. § 316(e), and not in a certificate proceeding. See American Trucking Ass'ns v. United States, 326 U.S. 77, 86-87, 65 S.Ct. 1499, 89 L.Ed. 2065 (1945); Railway Express Agency, Inc. v. United States, 153 F.Supp. 738, 741 (S.D.N.Y.1957), aff'd per curiam 355 U.S. 270, 78 S.Ct. 330, 2 L.Ed.2d 257 (1957). The Commission's decision not to depart from this procedure was entirely a matter within its discretion. Cf. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 202, 203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

[5] Plaintiffs have failed to show that the Commission's findings are insufficient as a matter of law to support its discretionary judgment that the public convenience and necessity require the issuance of the certifi-

cates which REA was granted. Nor have they shown that the findings are unsupported by substantial evidence.

II. THE COMMISSION WAS NOT REQUIRED TO INCLUDE IN THE CERTIFICATES GRANTED TO REA A RESTRICTION LIMITING TRANSPORTATION THEREUNDER TO SHIPMENTS HAVING A PRIOR OR SUBSEQUENT MOVEMENT BY RAIL OR AIR.

[6] The plaintiffs next contend that the Commission's grant of certificates of public convenience and necessity to REA without attaching conditions limiting transportation thereunder to shipments having a prior or subsequent movement by rail or air violates the Congressional "policy of opposition to railroad incursions into the field of motor carrier service (which) has become firmly entrenched as a part of our transportation law." American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 7, 80 S.Ct. 1570, 1574, 4 L.Ed.2d 1527 (1960). This policy is based upon the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding sec. 1, which declares that the Interstate Commerce Act is to be "so administered as to recognize and preserve the inherent advantages of each (mode of transportation);" and is also based on Sec. 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), which enjoins the Commission to withhold approval of an acquisition by a "carrier by railroad * * * or any person which is controlled by such a carrier, or affiliated therewith" of a motor carrier "unless it finds that the transaction proposed will be consistent with the public interest and will enable such (railroad) carrier to use service by motor vehicles to public advantage in its operations and will not unduly restrain competition." (REA concedes that it is affiliated with the railroads within the meaning of Section 5(2)(b).) The Commission long ago conclude that this policy required that the standards of Section 5(2)(b) be applied in proceed-

ings for certificates of convenience and necessity under Sec. 207. Kansas City Southern Transport Co. Common Carrier Application, 10 M.C.C. 221 (1938). Over the years the Commission has given effect to this policy by imposing certain restrictions in certificates granted to rail-affiliated motor carriers, as, for example, the condition limiting the applicant to the transportation of shipments having an immediately prior or immediately subsequent movement by rail (the so-called "rail-haul" restriction). This interpretation by the Commission of its statutory duty was expressly approved by the Supreme Court in United States v. Rock Island Motor Transit Co., 340 U.S. 419, 71 S.Ct. 382, 95 L.Ed. 391 (1951). Plaintiffs complain that the Commission erred in granting certificates to REA in the instant applications without including a "rail-haul" restriction. This contention is without merit. The Commission has often found in the past that the public convenience and necessity would be served by granting certificates to REA which omitted the rail-haul restriction. See, e.g., Railway Express Agency, Inc., Extension of Operations—Williamsport—Elmira, 26 M.C.C. 747 (1940), Railway Express Agency, Inc., Extension of Operations—Newport, R. I., 31 M.C.C. 689 (1942), Railway Express Agency, Inc., Extension of Operations—Washington—Harrisonburg, 33 M.C.C. 671 (1952). The Supreme Court, in approving the Commission's use of "the policy of § 5(2) (b) as a guiding light, not as a rigid limitation" in interpreting Section 207, has held expressly that the Commission had discretion to grant totally unrestricted operating authority to rail-affiliated companies

> "where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest. (citing cases)."

and has concluded that

> "* * * the underlying policy of § 5(2) (b) must not be divorced from proceedings for new certificates

> under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But, for reasons we have stated, we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the (restriction that proposed services be auxiliary and supplemental to train service in a certificate granted) in a § 207 proceeding."

American Trucking Ass'ns v. United States, 355 U.S. 141, 149-152, 78 S.Ct. 165, 2 L.Ed.2d 158 (1957).

In American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 at page 11, 80 S.Ct. 1570 at page 1576, 4 L.Ed.2d 1527 (1960), the Court quoted with approval the last paragraph set forth above, but held that the Commission had failed to find "special circumstances" sufficient to permit the granting of a certificate which did not contain the restriction there in question. In explaining the type of "special circumstances" required, the Court said:

> "There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as (applicant)." 364 U.S. 1, 14, 15, 80 S.Ct. 1570, 1578.

In this proceeding the Commission has in fact found the necessary special circumstances. The Commission's report takes note of the interpretation placed on the statutes by both itself and the Court and finds specifically (upon substantial evidence) that existing motor carriers are in fact unable or unwilling to perform the type of service rendered by REA. 91 M.C.C. at 340.

The American Trucking cases make clear that the Commission acted well within its authority in granting the certificates in this case without a "rail-haul" restriction. Indeed, such a restriction would have resulted in a denial of express service to shippers in the localities here under

consideration, since the very reason for the applications was the discontinuance of passenger trains carrying express freight to these communities.

Nor is the Commission's order in this case incompatible with the Congressional desire "to recognize and preserve the inherent advantages of each (mode of transportation)." National Transportation Policy, 49 U.S.C. preceding Sec. 1. The Commission has long recognized the "historical cleavage" between ordinary freight service and express service and that

> "(Express) service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services."

Railway Express Agency, Inc., Extension—Durant—Kosciusko, 34 M.C.C. 111, 114 (1942). Moreover, the Commission has expressly stated its willingness to look anew at any situation where common carriers show a willingness to compete in transportation of express traffic with REA to determine whether REA's motor vehicle operations work to "the undue detriment of common carriers of general freight." 91 M.C.C. at 340. Restriction No. 4, supra, gives the Commission "continuing jurisdiction to make certain that the * * * certificate issued here does not operate to defeat the National Transporation Policy." American Trucking Ass'ns v. United States, supra, 355 U.S. at 154, 78 S.Ct. at 172.

The remaining contentions in plaintiffs' brief do not find support in the record or in the case law sufficient to justify analysis or discussion thereof.

Complaint dismissed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 62-927-C

AUCLAIR TRANSPORTATION, INC., ET ALS.,
Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

JUDGMENT

September 11, 1963

In accordance with opinion of the Court filed on September 6, 1963, it is

ORDERED that the complaint herein be dismissed, with costs taxed at $.

By the Court,

/s/ WILLIAM J. LYONS
Deputy Clerk

/s/ JOHN P. HARTIGAN
JOHN P. HARTIGAN
United States Circuit Judge

/s/ EDWARD T. GIGNOUX
EDWARD T. GIGNOUX
United States District Judge

/s/ ANDREW A. CAFFREY
ANDREW A. CAFFREY
United States District Judge

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (SUB-NO. 1515)[1]

RAILWAY EXPRESS AGENCY, INCORPORATED EXTENSION—NASHUA, N. H.

Decided October 5, 1962

On oral argument in No. MC-66562 (Sub-Nos. 1515 and 1687), and on oral argument and reconsideration in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595):

1. Concluded that there is no need to promulgate a new definition of the term "general commodities moving in express service";
2. The usual restrictions appearing in applicant's certificates interpreted;
3. Concluded that applicant may petition for certain relief as set forth in the report, within a stated period of time;
4. Found that the findings in the prior report in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595), 84 M.C.C. 435, should be modified; and

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[1] This report embraces Nos. MC-66562 (Sub-No. 1577), Railway Express Agency, Incorporated, Extension—Newport, Vt. (prior report 84 M.C.C. 435); MC-66562 (Sub-No. 1594), Railway Express Agency, Incorporated, Extension—White River Junction, Vt. (prior report 84 M.C.C. 435); MC-66562 (Sub-No. 1595), Railway Express Agency, Incorporated, Extension—Boston (prior report 84 M.C.C. 435); and MC-66562 (Sub-No. 1687), Railway Express Agency, Incorporated, Extension—Middlebury, Vt.

5. In each of the embraced proceedings, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of general commodities, moving in express service, between specified New England points, over described routes, serving specified intermediate and off-route points, subject to certain restrictions. Issuance of certificates approved upon compliance by applicant with certain conditions, and applications in all other respects denied.

William H. Marx for applicant.

Kenneth B. Williams, Arthur A. Wentzell, Thomas J. O'Loughlin, Jr., Andre J. Barbeau, Charles W. Mulcahy, Jr., Charles A. McCarron, Richard J. McCarron, William J. O'Brien, Jr., Peter T. Beardsley, and *Richard R. Sigmon* for protestants and intervener in opposition in one or more proceedings.

REPORT OF THE COMMISSION ON ORAL ARGUMENT [2]

TUCKER, *Commissioner:*

The performance of express service by motor vehicle has long presented unique regulatory issues. Pending before us is a large volume of applications by applicant (REA) seeking authority to operate as a common carrier by motor vehicle of general commodities moving in express service. These five applications, representative of numerous others, present the broad regulatory problem of defining generally the circumstances in which, and the conditions and limitations under which, applicant properly may be allowed to engage in such operations. The character of the services now provided and herein proposed to be rendered by REA has generated unusual interest throughout the independent motor carrier industry generally, and existing motor common carriers of general freight have

[2] On reconsideration in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595).

expressed recently a growing concern over REA's "invasion of the field of motor carrier operations." In these circumstances, we deem it necessary and desirable to utilize the instant proceedings as a vehicle for the reappraisal and restatement of the requirements and policies which we believe should obtain with respect to grants of motor carrier operating rights to REA.

THE APPLICATIONS AND THEIR STATUS

All five proceedings involve applications by REA to operate as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, moving in express service over specified routes in the New England area, serving numerous intermediate and off-route points. The application in Sub-No. 1515, as amended, and those in Sub-Nos. 1577 and 1594, although separately filed on June 26, 1959, October 15, 1959, and December 4, 1959, respectively, propose routes that join together at Manchester, N.H., and White River Junction, Vt., to form a continuous network extending between Boston, Mass., on the south, and Newport, Vt., on the north, over highways in Massachusetts, New Hampshire, and Vermont. Also, Sub-No. 1515 proposes a route between Boston and Dover, N.H., and Sub-No. 1577 one between White River Junction and Whitefield, N.H. The application in Sub-No. 1595, filed December 4, 1959, seeks authority between Boston and Portland, Maine, and the application in Sub-No. 1687, filed June 6, 1960, as amended, seeks authority between Hoosick Falls, N.Y., and Middlebury, Vt. Of the 34 points proposed to be served by the 5 applications, a perusal of the REA certificates on file with us indicates that 14 are service points common to 37 other certificates now held by REA.

In all of the proceedings, REA requests that any authority granted be subject to two restrictions: (1) that the service performed by applicant be limited to that

which is auxiliary to or supplemental of express service, and (2) that the shipments transported by applicant shall be limited to those moving on a through bill of lading or express receipt. In the Sub-No. 1515 proceeding REA requests also the imposition of a restriction of the type which reserves our power to impose further conditions in its certificates.

Each proceeding is opposed by two or more motor common carriers and by the American Trucking Associations, Inc. (ATA), as an intervener. The precise territorial scope of each application and the carrier protestants thereto, who will be called hereinafter by short titles, are set forth in appendix A hereto.

Each proceeding was heard initially on a separate record and was the subject of an individual report and recommended order. The applications in Sub-Nos. 1577, 1594, and 1595 have been the subject of a consolidated report and order of division 1, *Railway Exp. Agency, Inc., Extension—Newport, Vt.*, 84 M.C.C. 435, decided February 14, 1961, hereinafter called the *Newport* case. The division therein granted all three applications as sought, subject to certain restrictions. Those imposed in the Sub-Nos. 1577 and 1594 proceedings are as follows:

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of rail or air express service.

2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.

3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the date of the certificates.

4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a serv-

ice which is auxiliary to, or supplemental of, express service.

In the Sub-No. 1595 proceeding restrictions (1), (3), and (4) above were imposed and, in addition, the following restriction, which embraces (2) above, was added:

> 5. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air, except that applicant may render local express service solely between Boston, Mass., and Portland, Maine.[3]

Petitions for reconsideration of the division's consolidated report and order have been filed by ATA and by three motor common carriers,[4] and REA has replied thereto.

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[3] Because certain of these restrictions will be the subject of considerable discussion herein, at this point it is best to indicate that the restriction in (1) above is commonly referred to throughout the industry as an "auxiliary and supplemental" restriction, and that the language in (5) above requiring an immediately prior or an immediately subsequent movement by rail is commonly referred to as a "rail-haul" restriction. We shall utilize this terminology hereinafter, and also, from time to time, refer to the restriction in (3) above as the "explosives" restriction; that in (4) above as the "future limitation" restriction; and that in (2) above and the similar language in (5) above as the "lading" restriction.

[4] Gay's Express, Holmes, and Graf. Gay's Express is a protestant to Sub-Nos. 1577 and 1594, Holmes is a protestant to Sub-No. 1594, and Graf is a protestant to Sub-No. 1595. Exceptions in the Sub-No. 1577 proceeding were filed subsequent to February 1, 1961, the effective date of rule 1.101 of our Rules of Practice which, as amended January 4, 1961, provides essentially that where the decision of a division does not reverse, modify, or change the initial report and recommended order, such decision shall be administratively final. Although the Sub-No. 1577 proceeding falls within the purview of this rule, we have, because of the nature of the issues involved, accepted the petitions for reconsideration therein, which we shall dispose of here in conjunction with the related petitions in Sub-Nos. 1594 and 1595. Petitioners in the Sub-Nos. 1577, 1594, and 1595 proceedings shall, for simplicity, hereinafter be referred to as protestants.

By order dated November 20, 1961, the three proceedings embraced in the *Newport* case were reopened on our own motion for oral argument, which was heard on January 16, 1962. Upon consideration of the petitions and the replies thereto, we are reopening the Sub-Nos. 1577, 1594, and 1595 proceedings for reconsideration on the present records.

The applications in the Sub-Nos. 1515 and 1687 proceedings have been the subjects of separate initial reports and recommended orders only. In the former the joint board, and in the latter the examiner, recommended that the applications be granted, subject to the same restrictions as were imposed by division 1 in the Sub-Nos. 1577 and 1594 proceedings. Exceptions to both recommended orders have been filed by certain motor common carrier protestants[5] and by ATA, whose exceptions include requests for oral argument, for consolidation of the application in Sub-No. 1515 with those involved in the *Newport* case, and for a determination, in accordance with rule 1.101 (a) of our General Rules of Practice, that the issues involved are of general transportation importance.[6] Joint and separate replies to all of the protestants' exceptions were filed by REA.

Because of the importance and the similarity of the issues involved in all five of the instant proceedings, we recalled the applications in Sub-Nos. 1515 and 1687 from

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[5] In the Sub-No. 1515 proceeding by Law and jointly by Holmes, Taylor's, Welch, Mutrie, and Graf; and in the Sub-No. 1687 proceeding by Marcell's, Gay's Express, and Mutrie.

[6] In Sub-No 1687, ATA contends also that the amendment of the application by REA at the hearing to extend one of the termini of the routes proposed therein from N. Hoosick, N.Y., to Hoosick Falls is an undue broadening of the scope of the application and should not be permitted. The original application, as published in the Federal Register, clearly indicated the intent of REA to provide service at Hoosick Falls; the amendment was not objected to by any protestant at the hearing; it does not appear to unduly broaden the scope of the application; and it is accepted by us.

division 1 in order that they might be orally argued before us in conjunction with those involved in the *Newport* case; and by the above-mentioned order of November 20, 1961, Sub-Nos. 1515 and 1687 were brought before us for consolidated oral argument with Sub-Nos. 1577, 1594, and 1595 on January 16, 1962. In view of the status of the Sub-Nos. 1515 and 1687 proceedings, no further action on the requests of ATA need be taken.

THE EVIDENCE

At this point, we shall review the factual situations in the Sub-Nos. 1515 and 1687 proceedings. In so doing, we have considered the evidence, the joint board's and examiner's recommendations, the exceptions, and the replies thereto. We find the statements of fact contained in the board's and examiner's reports to be complete and accurate in all material respects, and, as supplemented hereinafter, we adopt those statements as our own. It will be recalled that the remaining three cases are before us on reconsideration; and as it appears in light of the petitions and the replies thereto in such proceedings that the findings of fact and conclusions of division 1 in the prior report are complete and accurate in all material respects, they will not be disturbed by us except, as hereinafter indicated, to make them consistent, in certain technical aspects, with the general conclusions reached herein.

Applicant is a Delaware corporation with its principal office at New York, N.Y. It operates in excess of 12,000 motor vehicles in the pickup, delivery, transfer, and line-haul movement of express traffic throughout the United States and maintains more than 11,000 offices for the conduct of its business.

REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications, and it has been called upon over the years to handle merchandise of every description, including items such as foodstuffs, seafood, fresh meats, drugs and medicines, film, le-

gal papers, jewelry and other valuables, live animals, baby chicks, radioactive material, corpses, live blood, eggs, explosives, commodities which are injurious or contaminating to other lading, and commodities requiring special care and protection. The average weight of the shipments it handles, computed nationally, is approximately 50 pounds. It provides armed guard and surveillance services when required. Applicant will utilize van-type equipment in the performance of each of the services proposed.

The application in the Sub-No. 1515 proceeding was filed by REA after the discontinuance first by the Boston and Maine Railroad of the train service in which express moved between Boston and Dover, N.H., Boston and Manchester, N.H., Boston and Newburyport, Mass., and Portsmouth and Hampton, N.H., and, later, by the Boston and Maine Transportation Company, the motor subsidiary of the Boston and Maine Railroad, of temporarily substituted motor-for-rail service between the same points.

The Boston and Maine Railroad and its motor subsidiary each operated one round trip daily between the involved points. Upon the discontinuance of the latter's service, REA applied for and was granted temporary authority to operate over the routes involved. It has been doing so since on a weekday schedule of two daily round trips between Boston and Dover and one daily round trip between Boston and Portsmouth, and a 6-day schedule of one daily round trip between Boston and Manchester. It proposes to continue the same schedules if the application is granted, and to tack the authority here sought at Manchester with that involved in the Sub-No. 1594 proceeding, as mentioned above, and at Dover with other unspecified authority now held by it.[7]

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[7] We again take official notice of our records which indicate that such authority would be reflected in REA's Sub-Nos. 1363 and 1587 certificates, both of which contain the same restrictions as

The application is supported by 14 shippers, 11 of whom are located at or near proposed service points along the routes involved, and 3 of whom are located at the communities of Hooksett and Somersworth, N.H., and South Berwick, Maine, which points are conceded by REA not to be within the commercial zones of any of the involved service points.[8] This distinction aside for the moment, the 14 shippers collectively receive and ship from and to various points in the United States and those in other countries articles such as electronic equipment, shellfish, garments, silverware, office equipment, advertising material, eggs, baby chicks, and art work. The shellfish and eggs are of a perishable nature and require special care when transported, and the silverware and some of the electronic equipment and related parts require armed surveillance. All of the shippers have used applicant's service for the expeditious and special handling provided, which they desire to have available permanently; and a few use additionally the services of motor common carriers, principally for their large volume shipments, and parcel post and air express for other small shipments.

Applicant presented at the hearing shipping abstracts showing traffic handled by it under temporary authority over the proposed routes during a representative 7-day period in September 1959. These abstracts disclose, among other things, that REA transported between Boston and Dover a total of 754 shipments consisting of 1,095 pieces and a total weight of 40,177 pounds; between Boston and Manchester a total of 3,273 shipments consisting of 4,538 pieces and a total weight of 117,039 pounds; between Boston and Nashua 1,074 shipments consisting of 1,480 pieces and a total weight of 39,558 pounds; between Bos-

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were imposed by division 1 in the Sub-Nos. 1577 and 1594 proceedings, and, in addition, contain also a rail-haul restriction.

[8] Hooksett is located in the vicinity of Manchester, and Somersworth and South Berwick are located in the vicinity of Dover.

ton and Portsmouth 798 shipments consisting of 1,221 pieces and a total weight of 40,125 pounds; and between Boston and Hampton 83 shipments consisting of 264 pieces and a total weight of 11,345 pounds. Traffic which is local to each of the above segments of the proposed routes ranged from 4.3 to 11.8 percent of each segment's traffic during the representative period. The abstracts show also that applicant transported a large volume of traffic between Boston and Newburyport, and that it transported items such as currency, coins, and commodities moving under protective signature in interstate commerce between points local to the routes involved.

Eight motor common carriers[9] introduced evidence at the hearing. In general, each, except Mutrie, is authorized to transport general commodities, with the usual exceptions,[10] over regular routes, serving some or all of the points which REA proposes to serve. Mutrie, as here pertinent, in addition to transporting general commodities, with certain exceptions, in truckload quantities over irregular routes, specializes in the transportation of liquid commodities, in bulk, and those requiring the use of special equipment. Protestants' operating authorities, equipment, terminal locations, and the extent of their interests in the application are, as excerpted from the board's report, set forth in appendix B hereto.

The application in the Sub-No. 1687 proceeding was filed also upon the discontinuance of rail passenger service, in this case jointly by the Boston and Maine Railroad and the Rutland Railway, leaving freight trains as the only rail service available to move express traffic from

[9] Mutrie, Graf, Welch, Law, Auclair, Faltin, Holmes, and Taylor's.

[10] The usual exceptions to general commodity authority are commodities of unusual value, classes A and B explosives, household goods, commodities in bulk, and those requiring the use of special equipment. These exceptions almost uniformly appear in the pertinent portions of protestants' authorities.

and to the involved points. REA has been providing service over the involved route since June 1960, under temporary authority.

REA proposes to tack at Hoosick Falls any authority granted here with that contained in its Sub-Nos. 1425 and 1431 certificates authorizing service between Hoosick Falls and North Adams, Mass., and with that contained in its Sub-No. 1399 certificate authorizing service between Hoosick Falls and Albany, N.Y.[11] Albany is an important connecting point with rail and air services from and to many domestic and international express stations. Largely because of the rail connections to be made at Albany, applicant here seeks to institute its own operations which would give it flexibility in meeting trains that have been delayed, rather than utilize the services of existing regular-route common carriers who, REA suggests, would sacrifice such flexibility in order to maintain their own schedules.

Applicant will operate one round trip a day, Monday through Friday, from Albany to Hoosick Falls, and thence over the proposed route to Middlebury, with a separate round trip service operating between Rutland, and intermediate point, and Chester, Vt., also designated by REA as an intermediate point. However, Chester appears to be, in fact, the terminus of a separate route between Rutland and Chester with Brandon, Vt., as an intermediate point thereof, and will be so construed by us.

The application is supported by, among others, a shipper of gift wrapping paper and a shipper of lubricating equipment, each located at Bennington, Vt., which is not a service point on the involved routes; by a representative of Middlebury College, (Middlebury, Vt.) whose faculty and student body ship and receive articles such as baggage

[11] Sub-Nos. 1425, 1431, and 1399 each contain a rail-haul restriction.

and skis; and by a manufacturer of air valve accessories, gas gauges, and fuel ejection systems, located at Vergennes, Vt., also not a proposed service point.[12] Collectively, these shippers have utilized REA's service in the past for the movement of their express traffic to various points in the United States. Although they have used also the services of motor common carriers of general freight, they desire the proposed service for its expeditious and other special handling of their shipments. Other individuals appeared in support of the application, but were not themselves shippers or receivers of goods, and merely indicated the desire of third persons for the authorization of the proposed service.

Applicant presented at this hearing also an abstract of traffic transported by it from and to all of the involved points except Hoosick Falls during a representative 3-day period in February 1961. The abstract shows that REA transported a total of 770 such shipments of which 13, or 1.7 percent, either moved solely between points on the involved route or between such points and Albany, the operational terminus of the route. REA has transported over this route shipments of fish, fruit, meat, coins, dogs, and, in general, commodities of every description.

Four motor common carriers oppose the application. As here pertinent, Gay's Express, Marcell's, and Dubrey are regular-route carriers authorized to transport general commodities, with the usual exceptions, and Mutrie is authorized to transport liquid commodities, in bulk, in tank vehicles, with certain exceptions not important here, over irregular routes. Gay's Express is authorized to serve all of the involved points, which it does on a daily basis. However, it does not operate a specific schedule over the routes proposed, and does not provide pickup and delivery service at all of the involved points. Marcell's can

[12] Vergennes is located in the vicinity of Middlebury, and Bennington is located in proximity to North Bennington.

serve only those points on the proposed route between Middlebury and Rutland, and then only with respect to traffic moving from or to points in New York and New Jersey. Mutrie can serve all of the involved points except Hoosick Falls.

Dubrey's pertinent certificates authorize service at all points on the proposed route except Middlebury. It operates a daily service, but not under a regular schedule. Its tariff contains no minimum weight limitation [13] and it has transported shipments weighing as little as two ounces. However, its average single shipment weighs approximately 200 pounds. Dubrey concedes that REA performs generally a service which it is not accustomed to rendering, and that, while some shippers utilize both its service and that of REA, the traffic handled by REA is not the type which it, Dubrey, usually transports. Dubrey opposes the application in order to obtain any additional traffic within the purview of its authority.

GENERAL BACKGROUND

At the time of the passage of the original Act to Regulate Commerce in 1887 it was recognized by this Commission that a primary duty to furnish express service to the public rested with the railroads.[14] *Express Companies*, 1 I.C.C. 349. During the early days of regulation it was the practice of some railroads to conduct express operations in their regular course of business, while others contracted with independent express companies or-

[13] It is usual for the tariffs published by motor common carrier of general commodities to contain a minimum charge based on a shipment of 100 pounds. See, for example, New England Motor Rate Bureau, Inc., agent, MF-ICC No. A-202.

[14] Even prior to regulation, the courts had held the railroads chargeable with the duty of making their facilities available to the public for the transporation of express matter. *Express Cases*, 117 U.S. 1.

ganized for the same purpose. Although this Commission early in its history acknowledged that the railroads might "farm out" their small-parcel, or express traffic,[15] the Act to Regulate Commerce did not provide for the regulation of those independent express companies upon which the railroads' express business devolved, and it was not until the passage of the Hepburn Act of 1906 that the definition of a common carrier found in section 1(3)(a) of the act was amended to include express companies. As a result, such independent express companies thereafter became subject to our jurisdiction in certain respects, and we prescribed, among other things, interstate rates, rules, practices, and classifications for the principal express companies doing business on the railroads of the United States. See *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161. In 1918 several independent express companies organized into a single new consolidated company, called the American Railway Express Company, for the purpose of contracting with the railroads to conduct their express business. This arrangement continued until 1929, when the Nation's railroads conceived a plan for the establishment of the present Railway Express Agency, Inc., as their exclusive agent to conduct express service. See *Railway Exp. Agency, Inc., Securities and Control*, 150 I.C.C. 423. In 1938 Southeastern Express Company, the last competing independent express company, went out of business, and its chief patron, the Southern Railway Company, and several other affiliated rail carriers contracted with REA to perform their express service. *Railway Exp. Agency, Inc., Pooling Application*, 227 I.C.C. 517. Thus, REA, as we know it today, was created.

REA is now, and has been since its organization, wholly owned by certain railroads. It operates under an agree-

[15] *Express Rates, Practices, Accounts and Revenues*, 24 I.C.C. 381.

ment to which most of the country's railroads, including the owners of REA, are parties. See the *Determination* case, *supra*. The agreement currently in effect was discussed and approved by former division 3 in *Express Contract, 1959*, 308 I.C.C. 545. It, in many respects like the agreements that preceded it,[16] provides, among other things, that REA shall be the exclusive agent of the participating railroads for the conduct of their express business and that REA "shall have no net taxable income other than on real property and equipment sold." The 1959 contract also permits REA to select at its will any transportation instrumentality, including motor carriers operated by itself or others, for the movement of express traffic. Although, historically, REA's express service is related to the railroads, it performs also some services in connection, and under agreements with, most of the country's airlines. It has always operated motor vehicles, performing pickup and delivery service in connection with traffic which also moves by rail or air, and performing line-haul operations on its own behalf.

It is the motor vehicle operations of REA that concern us here. The decision in the *Determination* case established, in essence, that those motor vehicle operations of REA, in interstate or foreign commerce, (1) which involve the transportation of express traffic and are associated with a prior or subsequent movement by rail in pickup or delivery or transfer service within rail terminal areas, or (2) which are within the partial exemptions of section 203(b)(7a) or section 203(b)(8) of the act, or (3) which involve the transportation of general freight in pickup and delivery or transfer service within rail terminal areas, do not require operating authority under part II of the act; but that all other of REA's motor

[16] We take official notice of the agreement approved in 308 I.C.C. 545, as well as prior agreements approved in the *Securities and Control* case, *supra*, *Express Contract, 1929*, 275 I.C.C. 739, and *Express Contract, 1954*, 291 I.C.C. 11.

vehicle operations are subject to the economic provisions of part II. Our records indicate that since that decision in 1939 REA has filed approximately 1,700 applications seeking motor carrier authority. Owing, perhaps, to the discontinuance or curtailment of passenger train service in some areas of the country, or, perhaps, to other reasons, we have noticed an increase in the number of motor carrier applications that REA has filed recently, a total of 204 in 1960 and 1961.

This trend has not gone unnoticed by the independent motor carrier industry. Lately, opposition to these REA applications has mounted, and the character of the service which REA renders has been questioned by the industry in respects of which the instant proceedings are illustrative. We therefore deem it advisable to utilize these proceedings for a thorough reexamination of REA operations.

THE ISSUES IN GENERAL

Although the parties explore the evidence regarding the existence of a public need for the proposed services with a great deal of particularity, and take completely opposite views with respect thereto, the more important issues here, to which substantial portions of the pleadings are devoted, are those pertaining to the broader legal and policy questions surrounding REA's operations. In these respects it is the basic position of protestants and ATA that REA is embarked upon a program of converting its operations from those in the nature of true express service performed principally in connection with rail or air service, to those in the nature of nationwide general freight operations by motor vehicle unrelated to the rail operations of REA's sponsors, in competition with, and to the detriment of, existing common carriers of general freight; and that in pursuing and fulfilling this goal REA, because it is wholly owned by railroads, is in contravention of the national transportation policy and the

policy of section 5(2)(b) of the act against wholesale incursions by rail affiliates into the motor carrier field. REA's position is, in essence, that it simply seeks here to provide the same services by motor vehicle exclusively that it formerly was able to make available in connection with the use of passenger train service; and that the proposed services, to be operated without any prior or subsequent movement by rail, but with other rail-connected restrictions, in the circumstances here shown would not be an unwarranted or excessive separation from the essential nature of its overall operations as an express company. The underlying theme of REA's position appears to be that it has always provided, and here seeks to continue, the unique service of an express company which common carriers of general freight in almost every instance cannot provide equally well; and that the public, which has relied traditionally upon REA for the handling of both localized and nationwide express movements, should not be deprived thereof only because of the curtailment or discontinuance of rail passenger service which REA had been able to utilize formerly in the performance of such service.

The ramifications of the two positions are diverse and numerous. Among the problems raised are the following: the meaning of the description, "general commodities moving in express service," and the application of this definition in determining the extent to which REA is, or will be, in direct competition with common carriers of general freight; the meaning of the restrictions which appear in REA certificates and the effect of the restrictions on REA's service and competitive position; the extent to which, and the circumstances under which, we may properly omit any such restrictions, particularly the rail-haul restriction, from REA certificates; and several other interpretive issues such as whether or not REA may tack its certificates, especially those containing a rail-haul restriction, and whether REA, when operating under cer-

tificates issued pursuant to part II of the act, must observe defined commercial zone and terminal area limitations, or whether it may, instead, operate within broader, undefined terminal areas related to operations conducted pursuant to part I of the act.

DISCUSSION

General commodities moving in express service.—Basic to a consideration of REA's operations is the meaning of this term. This Commission has always thought of express service as connoting certain distinct characteristics. *Express Companies* and *Express Rates, Practices, Accounts and Revenues, supra.* In *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko,* 34 M.C.C. 111, these characteristics were stated, in part, as follows: [17]

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. The service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services * * * speed in handling is one of the principal characteristics of express service * * *.

Later, in *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573, and in *Mistletoe Exp. Service Extension—Texas,* 61 M.C.C. 737, 747, it was emphasized that the term "general commodities moving in express

[17] For an earlier statement of these principles in relation to motor carrier operations, see *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown,* 31 M.C.C. 363

service" includes a bona fide holding out, together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both; but that it does *not* include the transportation of liquid commodities in tank vehicles, commodities requiring special equipment, or household goods as defined by this Commission.[18] Another characteristic of express service, as explained in *Transportation Activities of Arrowhead Freight Lines*, 61 M.C.C. 131, 140, is that such service must be maintained on a regular-route basis.

At first blush it would appear that there should be no particular difficulty in understanding generally from the foregoing the limits, or meaning, of the term, "general commodities moving in express service" as that term is used in certificates issued by us. Certain protestants here, however, express the fear that REA does not consider certain of these definitions to be binding upon it and that it will, if tendered the traffic, transport liquid commodities, in tank vehicles, and commodities requiring special equipment under its outstanding and future "express" authorities. These protestants point out that in a few of REA's existing certificates, commodities in bulk and commodities requiring special equipment are specifically excluded, and ask whether the inference is raised thereby that where not specifically excluded from its certificates such commodities may be properly transported by REA.

ATA expresses concern also over the existing definition of express service as applied to REA. The interest of

[18] The *Mistletoe* case cites, for the proposition at hand, a prior report, 61 M.C.C. 131, in the *Arrowhead* proceeding referred to above. The order in that prior report was reversed by a United States district court on grounds other than the interpretations involved. It is of interest that the "express" interpretations in the *Mistletoe* proceeding and the *Arrowhead* case at 61 M.C.C. 131 refer to the interpretations of express in the *West Unity-Middletown* and *Durant-Kosciusko* cases, *supra*.

ATA in this respect is to protect independent common carriers of general freight from the excessive and unwarranted competition of REA which ATA believes will result from REA's motor carrier operations. At oral argument ATA suggested that a new definition of express service [19] be promulgated in order to insure that REA's operations remain solely those of a true express carrier.

The concern expressed by protestants and ATA is not altogether unfounded. At the hearing in the Sub-No. 1687 proceeding REA implied clearly that it was not bound necessarily by the *Arrowhead* and *Mistletoe* interpretations because, it contended, they are based on the particular holdings-out to transport by the carriers involved therein. It asserts, affirmatively, that its "express" authority is coextensive with its own holding-out as governed by its tariff publications, which constitute the only measure of its authority; and notes that it has always held itself out to transport shipments of any and all sizes, of ordinary and extraordinary value, "those requiring the type of service provided by it," and those which do not require expeditious handling and special security, as well as those that do. Significant is the avoidance by REA throughout these proceedings of specifically affirming any stated definition of express service.

Express service is a relative concept that has its roots in the circumstantial need by the shipping public for a special transportation service, and the responsive duty of common carriers to meet that need. Prior to the emergence of motor transportation it became clear that this specialized, or express, service obtained generally with

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[19] The ATA proposed the following language:

"A service superior to that held out and performed by ordinary freight carriers, in the expeditious handling and transportation of comparatively small shipments for which, because of size, fragility, perishability, or value, the ordinary freight carriers are not providing the necessary speed, careful handling, and security."

respect to small parcels which, for various reasons including the perishability, fragility, and value of the commodities involved, moved in an expedited manner, and that the railroads were not themselves desirous of maintaining the facilities with which to provide such service. Thus, as we described earlier, came the delegation by the railroads of this duty to various express companies, and finally to REA.

With the advent of regulated motor transportation we soon had occasion to observe a similar reluctance on the part of motor common carriers generally to provide regularly this expedited service on small-parcel traffic. See, for example, the *West Unity-Middletown* and *Durant-Kosciusko* cases, *supra*. These cases make it plain that this Commission has always intended the term "express service" to mean generally the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges.

From this view it follows that "express service" is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight.[20]

Completely in consonance with this entire concept of express service are the interpretations in the *Arrowhead* case, 63 M.C.C. 573, and the *Mistletoe* case, *supra*. The

[20] For this reason it has been stated, for instance, that "express" authority does not prohibit, per se, the transportation of quantity shipments under any and all conditions. *Arrowhead*, *supra*, 61 M.C.C. 131, 140.

conclusions in those cases to the effect that authority in terms of express service does not include the right to transport liquid commodities, in tank vehicles, commodities requiring special equipment, or household goods as defined by this Commission are based on a thorough consideration of the type of service that traditionally has characterized the movement of express. This service, as performed by motor vehicle, always has been one performed in ordinary van-type equipment, albeit equipped with mechanical refrigeration for the transportation of perishable commodities or safes for the transportation of valuable items and this Commission has on several instances stated this fact.[21] On no such occasion has this fact been challenged by motor carriers specializing in the transportation of express traffic.

In the past, this Commission has avoided a restrictive commodity interpretation of express service even when such an interpretation has been requested by existing carriers of ordinary freight in order to allay their concern that REA's express service would overlap unduly their general freight operations. *West Unity-Middletown* case, *supra*. The *Arrowhead* and *Mistletoe* interpretations in no way conflict with this approach that recognizes the inherent error in interpreting "express" authority strictly from a commodity viewpoint. Liquid commodities, in tank vehicles, commodities requiring special equipment, and household goods as defined by this Commission each are commodity descriptions relating the fundamental use of specialized equipment by specialized carriers in performing certain transportation.[22] The *Arrowhead* and *Mistle-*

[21] *Newport, Arrowhead*, 63 M.C.C. 575, *Mistletoe*, and *Arrowhead*, 61 M.C.C. 131, *supra*.

[22] Compare *Tidewater Transfer Co., Inc., Extension—Wines in Bulk*, 47 M.C.C. 496, and Ex Parte No. MC-19, *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, and various supplemental proceedings thereunder, and *Best Way of Indiana, Inc., Extension—Containers*, 86 M.C.C. 61.

toe exclusions from "express" authority of liquid commodities, in tank vehicles, commodities requiring special equipment, and household goods are designed to be essentially a reflection of the true nonspecialized nature of express service, resulting in a limitation on the equipment which has been, and may properly today be used in connection with operations conducted pursuant to authority to transport general commodities moving in express service.

We are unable to understand fully REA's reluctance to affirm these principles. Nowhere can we find any proceeding reaching a contrary result. A careful reading of both *Arrowhead* cases and the *Mistletoe* proceeding leaves no doubt that the conclusions reached therein regarding the use of van-type equipment exclusively by "express" carriers were based upon this Commission's concept of express service in general, and were not limited interpretations of the operating rights there in issue. The fact that the nature of the proceedings required such conclusions finally to be directed specifically to the certificates there involved does not alter the general import of the conclusions reached. That these conclusions were expressed in consideration of, among other things, REA's operations is plain from the references in the original *Arrowhead* case and the *Mistletoe* case to certain REA applications, hereinabove noted in footnote 18, as sources definitive of the nature of express service. It is clear that the *Arrowhead* and *Mistletoe* interpretations represent no reversal of any prior conclusions; are exemplary of conditions that have existed since the inception of transportation by motor vehicle of express; and are illustrative of the meaning of the term "general commodities moving in express service" as we have always intended it to apply in certificates issued by us. The fact that REA may have published tariffs purportedly reflecting broader operating rights does not alter this situation. *Bird Trucking Co.* v.

United States, 159 F. Supp. 717; *C & E Trucking Corp. —Modification of Permit*, 88 M.C.C. 391.

With regard, briefly, to the fact that certain of REA's certificates contain exclusions against the transportation of commodities in bulk or those requiring special equipment, we see no conflict thereby with the general interpretation of "express service." The description, "commodities in bulk," of course refers to a range of articles including, but much greater in number, than does the description, "liquid commodities, in tank vehicles." The exclusion against the transportation of commodities requiring special equipment [23] is mere surplusage, placed in REA's certificates through inadvertence on our part.

In view of the presently defined limits of express service, there is no need to promulgate any alternate or new definition of the term, such as that suggested by ATA. ATA's fears that REA is invading, through an expansion of its service, the field of common carriers of ordinary freight is not substantiated on these records. The evidence, in fact, indicates that a contrary conclusion is warranted.

We have noted above the statement of record to the effect that the shipments transported by REA throughout the Nation average approximately 50 pounds each. This general statement finds ample support in the evidence adduced in the Sub-No. 1515 proceeding, which shows that during a representative 7-day period REA transported between Boston and Dover, Manchester, Nashua, Portsmouth, and Hampton, a total of 5,982 shipments consisting of 8,598 pieces and totaling 248,184 pounds. The average weight of each shipment may thus be computed as being 41.5 pounds and the average weight of each piece as being 28.9 pounds. In contrast, the average

[23] We can find in our files only three REA certificates containing this restriction.

weight of a single shipment transported by Dubrey, a protestant to the Sub-No. 1687 application, is approximately 200 pounds.

Admittedly, these facts and figures do not establish conclusively a firm division of small and large parcel traffic between REA and ordinary common carriers in all circumstances. They do, however, indicate the strong probability of such a division and, in any event, as the only figures available here, fall far short of sustaining ATA's fears.

There is nothing in these records to indicate that the historical cleavage between the transporters of volume and small-parcel traffic has been disturbed effectively by REA. If the basis of ATA's concern is traceable to what it believes to be an inequity in the comparative rate structures on small-parcel and volume traffic, we repeat our view expressed many times before that such matters must be settled in appropriate proceedings, of which this is not one.

In summary, we believe that the existing definitions of "general commodities moving in express service," or similar terms, are a realistic and practical reflection of the nature of express service as it has always been conceived of by us; apply with full force to REA's certificates; and have not been shown to be in need of alteration or change at this time.

The restrictions in REA certificates.—One of the most complex areas in the field of motor carrier regulation is that involving the various restrictions normally imposed in certificates of rail-affiliated motor carriers. Substantial portions of the pleadings throughout these proceedings are devoted to the meaning and applicability of these restrictions. Rather than attempt here to set forth precisely these arguments, which we have considered thoroughly we shall take it upon ourselves to present the is-

sues without, in most cases, specific reference to the positions of the parties.

The usual situations giving rise to these problems, and the context in which most of our attention has been directed thereto, involve an application by a rail-owned motor carrier to institute operations, or an application by a railroad or its motor subsidiary to purchase the unrestricted operating rights of an independent motor carrier, in either case to be used in substitution for railroad operations. In both situations we have consistently recognized that—

> the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service * * *. [*Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 55 M.C.C. 567, aff'd., *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419.]

The "purposes forming the national transportation policy" that led to the *Rock Island* decision are clear. This Commission must—

> provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs

> of the commerce of the United States, of the Postal Service, and of the national defense. * * * [The national transportation policy, preceding section 1 of the act.]

Thus was formulated the *Rock Island* doctrine, based upon the national transportation policy and the following provisions of section 5(2)(b) of the act:

> *Provided*, That if a carrier by railroad subject to this part [part I], or any person which is controlled by such a carrier, or affiliate therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed [unification] transaction involving a motor carrier, the Commission shall not enter such an order [of approval] unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.[24]

To insure that these purposes are fulfilled, we developed five basic restrictions to be imposed in such certificates: (1) the service by motor carrier to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts shall be reported to the Commission and shall be subject to revision if and as the Commission finds it

[24] The quotation is from the present section 5(2)(b) which, by amendment, is slightly, but not significantly in these respects, different from the comparable provisions considered in the *Rock Island* cases.

necessary in order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. See *Pacific Motor Trucking Co. Extension—Oregon* 77 M.C.C. 605, 622 (*PMT* case). If warranted by special circumstances, certificates occasionally have been issued to rail-affiliated motor carriers without certain of the above restrictions. For example, *Pacific Motor Trucking Co.—Pur.—Lowinel Trucking Co.*, 60 M.C.C. 373, and *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*, 47 M.C.C 425.

Paralleling the development of this body of law governing the issuance of operating rights in the usual rail-affiliate situations was the evolution of a similar body of law regarding the imposition of restrictions in REA certificates. The latter precedents, however, lack the comprehensive discussions of the restrictions found in the former, leaving, in fact, a void as to certain specifics illuminative as to the meaning of the REA restrictions.

In a general way, the REA restrictions were explained in the *Newport* case, which, in so doing, pointed out their resemblance to those which appear in the certificates of the usual rail-affiliated motor carrier. 84 M.C.C. at pages 441, 442. We think, however, that the key to the meaning of the REA restrictions lies not in the similarities between them and those found in the usual rail-affiliate certificates, but in the dissimilarities between the two.

Most REA certificates contain an auxiliary and supplemental, a lading, a rail-haul, a future limitation, and an explosives restriction. The first three are of significance here, and their language usually takes the following form:

> 1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of air or railway *express* service. [Emphasis supplied.]
>
> 2. Shipments transported shall be limited to those moving on through bills of lading or *express* receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air. [Emphasis supplied.]

The emphasized words are symbolic of the difference between the purpose of the REA restrictions and the purpose of the corresponding restrictions shown in the PMT illustration above: while the motor carrier operations of a railroad or its subsidiary must be auxiliary to or supplemental of rail service, REA's motor carrier service is auxiliary to or supplemental of its *express* company service.

Notable, and in support of this conclusion, is the absence from the REA restrictions of any language equivalent to that found in the second restriction imposed in the PMT illustration, which limits service to points which are stations on a railroad. To understand fully the significance of this omission, the following portion of the discussion in *Texas & Pacific M. Transport Co. Com. Car. Application*, 41 M.C.C. 721, 726, will be helpful.

> Condition 1 limits the character of the service to be performed by the rail subsidiary motor-carrier to that which is auxiliary to or supplemental of the rail service of the railway. It limits the transportation to be performed by truck to the transportation of the rail traffic of the railway * * *. [The subsidiary's] status as a common carrier by motor vehicle is not dependent upon its having direct dealings with the shipping public. *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M.C.C. 405. *Its service is necessarily limited to points*

served by the railway, hence condition 2. [Emphasis supplied.]

Were the restrictions in REA certificates designed to render its motor vehicle operations auxiliary to or supplemental of rail operations, it is clear that a "condition 2" restriction would not have been omitted.

REA, as an express company, is a carrier which assumes responsibility for carriage having certain distinct characteristics, and in the discharge of this function it very largely utilizes the services of other common carriers. REA's predecessor, the American Railway Express Company, was held in *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, not to be a carrier by railroad and, for the same reasons which applied at that time, neither is REA.

The Congress made express companies common carriers under the act to conduct the express business of the Nation. Even before, and of course at the time the Congress so acted, it was recognized that express companies utilized modes of transportation other than rail. *Express Cases*, footnote 14, *supra*. Although the growth of express companies in the United States is bottomed largely upon the duty of the railroads to transport express traffic it is impossible for us to view express companies under the act as being the operational instrumentalities exclusively of the railroads. The railroads themselves do not view REA as being required to handle their express traffic only, nor, as we noted above, is REA restricted to the preferential use of rail service in discharging its duties as an express company. Any railroad is free at any time to withdraw from its agreement with REA. *Express Contract, 1954*, and *Express Contract, 1959*, *supra*.

The only relationship between the railroads and REA is one of financial control—and this of REA as an ex-

press company, rather than as the auxiliary or supplemental motor carrier. If REA, as an express company, were not financially related to the railroads, it is doubtful that its motor carrier operations would have to be restricted in the customary manner, for it is the express company's holding out upon which the public relies for the movement of its express traffic. Compare *Haggerty Contract Carrier Application*, 26 M.C.C. 413, and *Siebert Extension—Woodbury and Elmer, N.J.*, 34 M.C.C. 340.

Nevertheless, REA, as an express company, is a person controlled by or affiliated with a rail carrier within the meaning of section 5(2)(b) of the act. Taking cognizance of the national transportation policy and applying the act as a whole, it is to this relation that we give recognition through the imposition of restrictions in REA motor operating authorities. Our object has been and is to permit REA to operate to the fullest extent possible as an express company, and to impose in its motor carrier certificates only those restrictions necessary to safeguard against any misuse by the railroads of their control of the express company. Compare the *Arrowhead* case, *supra*, 61 M.C.C. 131, 135.

From this it follows that the meaning of the REA restrictions differs in some respects from the explanation given in the *Newport* case. Actually, the first, and basic, restriction limits the character of the motor vehicle service to be performed by REA to that which is auxiliary to or supplemental of the express company service. It limits the transportation to be performed by truck to the transportation of the express traffic of the express company at express rates and on express bills of lading, hence the lading restriction. The use of the words "air" and "railway" in the REA auxiliary and supplemental and future limitation restrictions are of no significant effect. If the auxiliary and supplemental restrictions were intended to reflect the affiliation of

REA as a motor carrier to a railroad or railroads within the purview of section 5(2)(b), the inclusion of the word "air" in the restrictions would be obviously inappropriate. We believe that these words are merely an evidentiary reflection of the way in which express traffic usually moves, and that they have become entrenched in the language of the REA restrictions through circumstances and repetition and, perhaps in analogy with the restrictions in the certificates of ordinary rail-affiliated motor carriers. But they are not necessary intrinsically to effectuate the purpose of the restrictions.

We must turn, then, to a consideration of the meaning and applicability of the rail-haul restriction. It is, without question the most controversial of the restrictions, and its applicability in REA certificates has been the subject of conflicting views by this Commission.

In *Railway Exp. Agency, Inc., Extension—Cheneyville, Ill.*, 53 M.C.C. 807 (not printed in full), decided February 26, 1952, former division 5 stated:

> It may be observed, however, that the condition requiring an immediately prior or an immediately subsequent movement by rail would be satisfied by an immediately prior or immediately subsequent movement by motor vehicles in substitute motor-for-rail service.[25]

As interpreted through the years by REA, the effect of this statement is to permit REA to tack a certificate containing a rail-haul restriction with a similar certificate held by it or by any other motor carrier. In this respect, the *Newport* case represents the opposite view, for it declares clearly, at 84 M.C.C. 443, footnote 2, that this is not permissible.

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[25] The division therein went on to say, in effect, that the first, or auxiliary and supplemental restriction, prevents REA from transporting local interstate traffic. As we have explained partially above, and will indicate further below, this interpretation is not accurate.

At oral argument, REA conceded freely that it has been tacking its rail-haul restricted certificates for years under a *Cheneyville* interpretation, and asserts essentially that an interpretation here prohibiting tacking will have the effect of putting it out of business in many parts of the country. ATA and protestants contend that the language of the rail-haul restriction is unambiguous on its face and that its proscription against tacking is clear. While the rail-haul restriction may appear to be unambiguous on its face, the *Cheneyville* case clearly raises a conflict concerning the restriction, and the only way in which this conflict can properly be resolved is to look to the purpose of its imposition. In this respect, the *Newport* case aptly summarizes several illustrative situations.

> We agree with protestants that a rail-haul restriction should be imposed in situations in which an express service, shown to be required by the public convenience and necessity, can be performed in connection with rail or air express service. Where a needed express service cannot be performed in this way, however, this restriction may properly be modified or omitted. For example, if there is a need for the transportation of local express shipments between points on the particular route under consideration, the rail-haul condition may be modified so that it applies only to shipments moving from or to points beyond those on the route, but does not apply to merely local shipments * * *.
>
> The rail-haul restriction has also been omitted where for some other reason the public interest requires an all-truck express service. *Railway Exp. Agency, Inc., Ext.—Washington-Harrisonburg* [33 M.C.C. 671] presented a situation in which the rail service in conjunction with which the proposed motor service would have had to be utilized was not such as could be conveniently used by applicant. It was found that the use of this rail service would

> necessitate transfers and would result in delays in transit, and that if a rail-haul restriction or a key-point restriction were imposed, the flexibility and expedition of applicant's express service would have been considerably lessened * * *. It was found there that no such restriction should be imposed.

From the foregoing discussion it should be patently clear that the rail-haul restriction in REA certificates is utilized simply to reflect the type of need shown in each case for the service proposed. If the evidence establishes a need for interstate traffic to move between points wholly local to the route involved, or if the service proposed is not or cannot be dependent upon connections with other underlying transportation, the rail-haul restriction, or similar language connecting the proposed service with any other underlying service, should be omitted. On the other hand, where the evidence establishes that the REA motor vehicle service proposed will be used in connection with other underlying transportation, the authority granted can be related thereto by the imposition of an appropriate restriction.

In this posture it becomes clear that a normal rail-haul restriction appears in REA certificates simply because in obtaining its motor carrier authority, REA showed that the express service to be rendered would be performed as an integrated rail-motor movement; no all-motor movement was contemplated. In that context was the certificate granted, and in that context must the meaning of the restriction be viewed. The usual rail-haul restriction does not contain any specific prohibition against tacking, and we conclude that an REA certificate containing such a restriction may be joined with other certificates as long as the traffic moved thereunder is not transported in a wholly motor movement. Compare *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716.

For clarity, we must state that this conclusion is reached without comment as to the validity of the *Cheneyville* position which, even if true, is not applicable here because it is a concept involving so-called substituted motor-for-rail service. The operations for which REA requires authority under part II of the act are admittedly, when sought upon the discontinuance or curtailment of passenger train service, very close indeed to a substituted motor-for rail service as the term is commonly used. We have ourselves from time to time lapsed into the use of this term in referring to REA motor operations. But it is not accurate, for what REA is actually performing is a line-haul motor vehicle operation on its own behalf to replace train service which it, as an express company, formerly utilized.

These motor vehicle operations are completely in conformity with the concept of express service, upon which concept we would turn our backs if we were to interpret the rail-haul restrictions as requiring literally a complete prior or subsequent movement over steel rails. It is, perhaps, thus unfortunate that many of REA's certificates were obtained in circumstances that prohibit the traffic involved to move wholly free of the rail service with which it was proven to be associated; but we are powerless here to remedy that situation. Under the rail-haul interpretation here, REA will still not be able to transport express traffic wholly by motor vehicle, and the public will continue to have available the express service upon which it has relied and which it might lose if a more restrictive, unrealistic interpretation were given to the rail-haul restriction.

An examination of the proceedings here will disclose, however, that REA is now tacking its certificates which contain rail-haul restrictions and performing thereby wholly motor services. This is apparent, for instance, by its proposal in the Sub-No. 1687 proceeding. Even

though we have concluded that such actions are not permissible, the practices involved are apparently of such duration, and the public interest is, as a whole, so obviously affected that we would not be justified in disposing of the matter in a manner foreclosing an equitable opportunity to resolve this situation openly. We deem it advisable and necessary, therefore, that in those instances where REA is now conducting, or proposes to conduct, operations wholly by motor vehicle pursuant to certificates containing rail-haul or similar restrictions, it file with us within 90 days of the service of this report, or within such further time as may be authorized by this Commission, appropriate petitions for modification of such certificates, setting forth fully therein the complete motor vehicle service desired to be performed. Other parties will then have an opportunity to represent their interest, and the performance of such operations may then be resolved in a suitable manner. Should no such petitions be forthcoming, we shall then consider this issue closed. In any event, should future REA application for motor carrier authority involve the joinder of existing certificates containing rail-haul restrictions, we will expect such issues to be set forth and developed fully by REA and expect further that any necessary modifications of authority will be sought concurrently.

The limits of REA's motor vehicle operation with respect to commercial zones and terminal areas.—The last interpretive issue remaining for consideration is whether REA, when operating motor vehicles pursuant to certificates issued under part II of the act, is bound, as it alleges, only by terminal areas which are established, in general, simply by a tariff publication holding out collection and delivery service at certain points in connection with prior or subsequent rail transportation performed pursuant to part I of the act, or whether it is bound by commercial zone and terminal area limitations

as defined in the sixth supplemental report in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21.

REA's position is, basically, that the *Determination* case, (at pages 187, 188, and 189) finds not to be within the regulatory requirements of part II a pickup, delivery, or transfer service by motor vehicle within rail terminal areas, which operations are associated with a prior or subsequent express service by railroad and are rendered free of charge, and that, once again the rail movement may be satisfied by REA's motor vehicle operations in substituted motor-for-rail service. ATA and protestants' positions are that REA's substituted motor-for-rail theory does not gain for REA in the performance of its line-haul motor operations the benefit of the terminal area exemption available in connection with rail movements.

The resolution of this issue is not aided significantly by the records before us. REA's arguments are couched largely in terms of its motor vehicle operations being in substitution for rail operations, a position which, as we have noted above, is not accurate, and which even if true, would not gain necessarily for REA the benefit of the terminal area exemption which it claims. Compare *New York Central Transport Co.—Modification*, 89 M.C.C. 389. Moreover, although REA states that it generally has been serving points outside the prescribed motor carrier terminal areas and commercial zones in connection with its overall operations, the manner and extent to which it does so is not described with much precision or detail. In these circumstances, rather than attempt now to reach a definite and final resolution of these problems, we shall, with a view toward the institution of a separate proceeding in which these matters may be further developed and examined, at this time simply define the broad outlines of REA's unique status

in conducting motor operations in terminal areas. To bring the issues more clearly into focus, we think it will be helpful to begin with a brief review of the statutory and decisional criteria significant in this area.

Prior to the enactment in 1935 of the Motor Carrier Act (part II of the Interstate Commerce Act), this Commission rendered several decisions which established that motor collection, delivery, and transfer services within terminal areas by carriers subject to part I of the act were services accessorial to transportation, subject, within the meaning of section 1(3), to part I; and that the holding out to perform these accessorial services should be embraced in tariffs on file with this Commission. As opposed to terminal area services, however, these decisions found that line-haul transportation by motor vehicle was not subject to the jurisdiction of this Commission under part I. *Coordination of Motor Transportation*, 182 I.C.C. 263, 368; *Motorbus and Motortruck Operation*, 140 I.C.C. 685, 729; *Tariffs Embracing Motortruck or Wagon Transfer Service*, 91 I.C.C. 539, 546.

Upon the enactment of part II, these decisions were reflected in the language of section 203(a)(14), which contained in its original definition of a motor common carrier the following provision:

> including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

At the time of the *Determination* case, *supra* (1939), the section 203(a)(14) definition, as excerpted partially above, was (apart from the general provisions of section 203(b) (7a) and (8) of the act) the only statutory guide for determining the extent to which an express company subject to part I required authority under part II for its motor vehicle operations.

In 1940, section 202(c) was added to part II of the act, and, as amended, now provides a regulatory exemption:

> (1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to [parts I, III, or IV];
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, * * * to which such services are incidental.

As a corollary to the adoption of section 202(c), the section 203(a)(14) definition was altered to continue the exclusion contained therein with respect only to express companies. The pertinent part of that section now reads:

> except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered and shall be regulated as transportation subject to part I.

The close relation between the type of exclusion provided in section 202(c) and that which was retained exclusively for express companies in section 203(a)(14) was considered in the Ex Parte No. MC-37 cases defining the exempt terminal area zones. The third supplemental report therein, 48 M.C.C. 418, as affirmed in the sixth supplemental report, supra, dealt only with the terminal area exemption provided under section 202(c), and, by way of background, stated, at 48 M.C.C. 419:

> Section 203(a)(14) was the only provision of part II of the act, as originally enacted, which operated to exempt from regulation local transportation which was performed under a common control, management, or arrangement, et cetera. It defined motor common carriers, whose operations were subject to regulation, in such a manner as to exclude those operations which were already subject to the provisions of part I of the act, namely those in the performance of collection, delivery, or transfer service, which were deemed to be a part of rail and railway express services.

Thus, it can be seen that the definition of motor carrier operations subject to economic regulation under part II of the act excluded the interstate operations of an express company only to the extent those operations, in the words of the pertinent 1940 legislation, had "heretofore been subject" to regulation under part I.

The question at this point is to what extent REA's operations had been subject to regulation under part I prior to the 1940 legislation. To establish the answer to that question in relation to REA's terminal area operations is a relatively complex matter. None of the earlier decisions of this Commission dealt specifically with the issue of whether, under part I, express company terminal services were themselves subject to regulation. *Express Rates, 1922*, 83 I.C.C. 606, established our part I juris-

diction over those express company terminal services performed as an incident to rail service. Compare the *Determination* case, 21 M.C.C. 161, 185. *American Highway Frt. Assn., Inc.*, v. *Ry. Exp. Agency, Inc.*, 201 I.C.C. 755, found not to be within our part I jurisdiction the line-haul movement of express traffic wholly by motor vehicle. Compare the *Determination* case at 21 M.C.C. 181. The *American Highway* case, in reaching the ultimate finding for which it is here cited, did, however, more broadly go into our jurisdiction over express companies. In that proceeding, at pages 758-759, it was stated:

> While well established that an express company is not a "common carrier by railroad" within the particular statutory provisions under consideration in the cases cited, express companies are engaged in the transportation of property wholly by railroad or partly by railroad and partly by water within the exact meaning of section 1 of the Interstate Commerce Act. Such fact is a matter of common knowledge. Complainant's suggested construction of section 1 would extend our jurisdiction to all express companies handling property by truck, airplane, or other method of transportation not involving rail service. No such interpretation can be seriously entertained. A fair reading of all of the pertinent provisions of section 1 leads to the conclusion that express business which is subject to our jurisdiction is that which is handled over railroads, or partly by railroad and partly by water within the conditions stated in the act. The law has no application to a highway transportation service under the circumstances here involved.

In its broadest posture, the *American Highway* case may be viewed as having limited our part I jurisdiction over express companies *exclusively* to those services immediately associated with line-haul movements wholly by rail or partly by rail and partly by water. It was

viewed in this manner in the *Determination* case, and, clearly, so might it have been viewed by the Congress. Yet, had that been the law, there would have been a basic weakness in our jurisdiction which we find difficult to explain in light of the reason that required the inclusion of express companies in part I. It will be recalled that that reason was to protect the public in all instances where express traffic moved, without regard as to whether the traffic was handled by the railroads themselves or "farmed out" to independent express companies. That purpose could not have been fulfilled effectively had this Commission been required, after the inception of local express activities, to wait and see to which mode—rail or motor—the traffic was tendered for line-haul movement. It appears to us that this Commission had jurisdiction over all local express services particularly to further its legitimate interest in those services which actually were associated with movements by rail or partly by rail and partly by water. This conclusion gains some support from the fact that we did accept for filing express tariffs covering terminal services alone. See the *Determination* case, at 21 M.C.C. 185.

Thus, we believe that there was some room for doubt under the *American Highway* case with regard to the precise question which is brought clearly into issue here—the question of whether or not all terminal services of the express company have "heretofore been subject" to regulation under part I. The findings in the *Determination* case appear to reflect the broad views of the *American Highway* case, and that is the state of matters as we see them today.

It would follow then that the terminal accessorial services associated with an interstate line-haul movement by motor vehicle, a movement not embraced within the scope of section 1(1), were not as such considered by us to be subject to regulation prior to the enactment of

section 203(a)(14), either in its original form or in its present form. Under the *Determination* case, this type of terminal area transportation became subject to regulation under part II in 1935. Furthermore, even though it has an independent status as a common carrier by express subject to part I, it seems obvious that when using regulated carriers in various forms of surface transportation, an express company is not entitled to have those regulated carriers provide any service for which they lack specific authority. In other words, when REA uses the services of a certificated independent motor carrier, or even when it operates over its own certificated highway routes, it is bound by all limitations inherent in such operating authority, including any which limit the performance of pickup and delivery service to a specifically defined motor carrier terminal area. And while we might be disposed to question the broad application of the *American Highway* case with respect to our part I jurisdiction over express companies, we shall not do so here.

We do think, however, that with the fact of REA's decreasing utilization of passenger trains, and its increasing reliance on line-haul motor transportation, this state of the law is apt to foster unnecessary legal complications in what should be a relatively simple carrier-shipper relationship. Unless the effect and applicability of various provisions of the law are coordinated, it would seem that the maximum pickup and delivery zones at a given community incident to a line-haul shipment by a common carrier by express, such as REA, would vary depending upon whether the transportation has been by means of rail or motor vehicle. We do not view this as a tolerable situation, and we will take the necessary steps to remove this probable uncertainty. At this time, we conclude that it would be in the public interest to institute a specific proceeding with the purpose of defining the terminal area of an express company as that

type of carrier is regulated by the Interstate Commerce Act as a whole.

We shall therefore refer the matter to division 1 for the institution of an appropriate proceeding in which the necessary information may be made of record, the views of interested persons expressed, and the issue clearly resolved.

Summary or discussion.—What we have said above has been mostly in an interpretive vein, and we think it necessary to attempt now to indicate generally with what force and in what manner these interpretations will effect the disposition of certain issues arising in REA applications. The principal problem to be discussed in this context are the conditions under and the extent to which REA may properly be authorized to institute motor vehicle operations without establishing the existence of special, or unusual, circumstances.

As we have noted, the provisions of section 5(2)(b) of the act have the effect of requiring that an application by a rail-owned or affiliated motor carrier for operating authority must be denied unless it is shown that the authorization of the operation "will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." The restrictions that appear in certificates thus issued are designed to relate properly the motor vehicle operations authorized to the operations of the rail or rail-controlled carrier on whose behalf they are conducted, and the restrictions may not be relaxed, and the motor vehicle operations accordingly disassociated with those of the parent, unless special circumstances are shown to exist. *Rock Island* cases, *supra*, and *American Trucking Assns.* v. *United States*, 355 U.S. 141.

To interpret generally these principles in terms of REA operations is not a difficult matter in light of what has been said above. The activities to which REA motor vehicle operations must relate are those of the express company. When it seeks to institute motor vehicle operations of such nature, it is appropriate to impose an auxiliary and supplemental, a lading, and most importantly, a future limitation restriction. See *American Trucking Assns.* v. *United States, supra.* Depending upon the need shown for the type of service proposed, it may also be appropriate to include a rail-haul or an explosives restriction.

When REA seeks to institute motor vehicle operations which are not auxiliary to or supplemental of those of the express company then, in order for it to succeed, it must show that special circumstances exist. For example, if REA should seek to render an irregular-route service, which service, as we have noted, has not been considered to be in the nature of an express service, it would appear that special circumstances would have to be shown in order for such application to be granted. Also, because the express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for REA to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist.

We recognize that our discussion here could greatly facilitate the expansion of REA operations by motor vehicle. If so, we are assured that it will not be to the undue detriment of common carriers of general freight. These carriers have always been authorized to transport express traffic, but by and large, judging from the absence of any real showing by them that they do engage

more than occasionally in the transportation of express traffic, they have never exercised effectively their ability to compete with REA, no matter what mode of underlying transportation it has utilized. When, in a particular case, or in general, we are shown that contrary conditions exist, a different conclusion might then be warranted.

The use of the various existing transportation modes and carriers is, of course, a quality intrinsic to the operations of an express company. In innumerable situations, this practice is followed by REA. But when, for any number of reasons, the existing services are not compatible with the transportation of the wide range of commodities that move in express service, or with the expedition or special care provided in an express movement, there is ample cause for REA to institute motor vehicle operations on its own behalf. We do not view favorably the argument generally made by common carriers of ordinary freight that an REA application for motor carrier operating authority should turn on a showing by REA that it will transport over the route involved a significant number of commodities requiring, by nature, special handling. This argument loses sight of the fundamental function of an express service. It is a premium service utilized by shippers whenever speed or special handling, rather than rates, are of importance. The choice is the shipper's; if he chooses to have his property move in an expedited fashion he is, in fact, using an express service. It is clearly in the public interest that, if at all possible, this choice not be precluded.

The traditional reliance by shippers upon express service to meet certain of their transportation needs, and upon general freight operations to meet others of their needs, has always provided, itself, a natural line of demarcation between the two types of services. In our judgment, there is no doubt that a well-balanced national

transportation system includes the maintenance of both. The motor vehicle movement of express by REA in the approved manner described above does not appear to present any real threat of undue competition with the operations of independent common carriers generally. But the diminution of passenger train service, and of the expedited operations of the railroads in which express traffic has historically moved, does present a threat to the continued existence of the nationwide express service upon which this country has relied. The disappearance of this system would, we think, be clearly contrary to the public interest.

The *Determination* case, 21 M.C.C. 161, 189, prophetically realized that our administration of matters such as those discussed here would not be without some confusion. It is neither possible nor desirable to predict the future application of principles in this field to specific situations, and occasions may arise for their modification. Yet we hope that in the course of events to come, the guidelines drawn here will prove helpful in coordinating and preserving a strong national transportation system.

CONCLUSIONS IN SUB-NOS. 1515 AND 1687

In our opinion, the evidence establishes a need for the services proposed in each of these proceedings. In both cases, even without regard to the support of shippers not shown to be located at the involved service points, a substantial amount of express traffic is presently moving from and to points on the routes involved. While much of this traffic is, as pointed out by certain protestants and by ATA in their respective exceptions, not traffic which inherently requires special handling of the type excluded from the authorities of, or otherwise not normally handled by, the protestants, it is, nevertheless, traffic which we may judge to be bona fide express traffic through its movement, in the past, in applicant's premium service.

Both Sub-No. 1515 and Sub-No. 1687, the latter as interpreted by us hereinabove, involve two separate segments of authority. In each proceeding there are one or more protestants authorized to serve all of the points involved on one or both of the segments. All such carriers, however, hold authority restricted against the transportation of commodities of unusual value, and thus are unable to perform the complete service shown to be required. More important, though, is the fact that none of these protestants renders regularly an express service; for if they do, they have failed to so indicate on these records. Applicant, under temporary authority and before that in connection with passenger train operations, has been providing express service at the communities involved in both of these applications. Were protestants able to show that at any time they were effectively competing for and transporting express traffic, we might be able to accept their argument now that they are interested in and capable of doing so. But absent such proof, we must view the evidence as supporting the conclusion that the protestants do not render regularly any express services. In light of the need established for such services, the applications should be granted.

There remains for consideration the form of the authority to be granted. As we stated earlier, where it does not appear that there is a need for interstate all-motor traffic to move solely between points on a proposed route, any certificate granted should be restricted appropriately. Such is the case in the Sub-No. 1687 proceeding. There, none of the local traffic has been shown to be moving other than between points in Vermont. With the exception of this intrastate traffic, all of the traffic will move from or to Hoosick Falls in connection with other motor vehicle operations of the applicant. Accordingly, the authority granted will reflect this pattern of operation.

In the Sub-No. 1515 proceeding, it has been established that a significant volume of traffic will move in interstate commerce between points on the route, and no such restriction should be imposed.

THE PROCEEDINGS ON RECONSIDERATION

Although we have reopened for reconsideration the Sub-Nos. 1577, 1597, and 1595 proceedings, we agree with the findings in the prior report that a need has been established for each of the services proposed. The petitions for reconsideration herein raise, in addition to the interpretive matters discussed by us, substantially the same issues considered and adequately disposed of by division 1. The only new issue raised on petition is the claim that in disposing of the Sub-Nos. 1577 and 1594 proceedings, division 1 assumed, improperly, the granting of REA's Sub-No. 1515 application, which links the routes involved in the Sub-Nos. 1577 and 1594 proceedings with Boston, a point from and to which much of the involved New England traffic flows. Inasmuch as we have already determined that a need exists for the service proposed in the Sub-No. 1515 proceeding, this point is now moot.

In reviewing the records in these proceedings, however, we do notice that certain of the supporting shippers in the Sub-Nos. 1577 and 1594 proceedings do not appear to be located within the commercial zones of any of the service points involved. Specifically, these are a shipper in the Sub-No. 1577 proceeding located at Lyndonville, Vt., and five shippers in the Sub-No. 1594 proceeding located at New London and Andover, N. H. Irrespective of the support of these shippers, the evidence in these two proceedings, as well as that in the Sub-No. 1595 proceeding, fully sustains the conclusions of division 1 at pages 440 and 441 of the prior report, and we adopt such conclusions as our own.

The only principal alteration of the findings of division 1 which appears to be necessary in light of our general discussion above is with respect to the modified rail-haul restriction imposed in the Sub-No. 1595 proceeding. As imposed by the division, this restriction was clearly intended to permit the rendition of a service wholly local to the route involved between Boston and Portland; and, at the same time, to prohibit the use of the authority granted in conjunction with another REA certificate, containing a rail-haul restriction, authorizing service beyond Portland. In view of our conclusions above, the restriction is no longer necessary.

We agree that the evidence requires the omission of the rail-haul restriction in the Sub-Nos. 1577 and 1594 proceedings, and the division's findings therein shall not be disturbed except with respect to certain technical adjustments to the language used in the other restrictions.

FINDINGS

In No. MC-66562 (Sub-No. 1515), and upon reconsideration in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities moving in express service, between the points and over the described routes sought as set forth in appendix A hereto, subject to the following conditions:

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of express service of the Railway Express Agency.

2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.

3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall

be limited, in point of time, to a period expiring 5 years from the date of the certificate.

4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary to or supplemental of express service of the Railway Express Agency.

In No. MC-66562 (Sub-No. 1687), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities moving in express service (1) between Hoosick Falls, N.Y., and Middlebury, Vt., from Hoosick Falls over New York Highway 22 to North Hoosick, N.Y., thence over New York Highway 67 to its junction with Vermont Highway 67, thence over Vermont Highway 67 to its junction with U.S. Highway 7, thence over U.S. Highway 7 to its junction with U.S. Highway 4 at Rutland, Vt., thence west over U.S. Highway 4 to its junction with Vermont Highway 3, thence over Vermont Highway 3 to its junction with U.S. Highway 7, and thence over U.S. Highway 7 to Middlebury, and return over the same route, serving the intermediate points of North Bennington, Arlington, Manchester, Danby, Rutland, Proctor, and Brandon, Vt., and (2) between Rutland and Chester, Vt., from Rutland over U.S. Highway 7 to its junction with Vermont Highway 103, and thence over Vermont Highway 103 to Chester, and return over the same route, serving the intermediate point of Ludlow, Vt., subject to the conditions numbered (1), (3), and (4) above and, in addition, to the condition that—

Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor carrier move-

ment by applicant, an immediately prior or an immediately subsequent movement in express service of the Railway Express Agency.

We further find that applicant is fit, willing, and able properly to perform such services and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder, that certificates authorizing such operations should be granted; and that the applications in all other respects should be denied.

Upon compliance by applicant with the provisions of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, within the time specified in the order entered concurrently herein, appropriate certificates will be issued. An appropriate order will be entered.

COMMISSIONER MCPHERSON concurs in the result.

CHAIRMAN MURPHY, concurring:

Although I agree with the ultimate findings made herein, I am unable to agree fully with certain of the general discussions. In particular, it seems to me that the sometime use of the words "air" or "rail" in applicant's auxiliary and supplemental and future limitation restrictions may not be entirely inappropriate because those words permit applicant to handle express traffic generated by other carriers. It also seems to me that there is a twilight area where applicant and independent motor carriers are competitive, and that rail haul restrictions have been deliberately imposed in an effort to protect the independent carriers from the possibility of unequal competition at the hands of a carrier with superior resources. Possibly, the realities now are such that applicant's rail-haul restrictions should be eliminated. However, if this is true, it would seem that the time also has

come for an extended review of the definition of express service with a view to determining the nature of "quantity shipments" and the conditions under which such shipments may be transported under express authority.

Finally, in respect of the terminal area question, I wish only to observe that in *Express Rates, 1922, supra*, this Commission rejected a request for the establishment of terminal-to-terminal rates for rail transportation separate and distinct from rates or charges embracing pick-up and delivery, and that except in limited circumstances express rates continue to apply on a point to point basis.

APPENDIX A

NO. MC-66562 (SUB-NO. 1515)

Authority sought.—General commodities, including classes A and B explosives, moving in express service, over regular routes, (1) between Boston, Mass., and Manchester, N.H., from Boston over city streets to Somerville, Mass., thence over Massachusetts Highway 38 to its junction with Massachusetts Highway 128, thence over Massachusetts Highway 128 to its junction with U.S. Highway 3, and thence over U.S. Highway 3 to Manchester, and return over the same route, serving the intermediate point of Nashua, N.H., and (2) between Boston, Mass., and Dover, N.H., from Boston over city streets to East Boston, Mass., thence over U.S. Highway 1 to its junction with U.S. Highway 95, thence over U.S. Highway 95 to its junction with New Hampshire Highway 16, and thence over New Hampshire Highway 16 to Dover, and return over the same route, serving Newburyport, Mass., and Hampton, N.H., as off-route points, and Portsmouth, N.H., as an intermediate point.

Protestants.—Brink's, Inc., Alvin R. Holmes Transportation Service and/or Jones Express, Taylor's Express Co., P. B. Mutrie Motor Transportation, Inc.,

Graf Bros., Inc., H. P. Welch Co., Auclair Transportation, Inc., J. E. Faltin Motor Transportation, Inc., W. A. Stackpole Motor Transportation, Inc., Victor M. Mitchell, doing business as Mitchell's Express, Law & Ingham Transportation Company, Inc., and Southwestern New Hampshire Transportation Company, Inc. In No. MC-F-7259 (by order of September 17, 1959) the latter two carriers were consolidated with Law Motor Freight, Inc.

NO. MC-66562 (SUB-NO. 1577)

Authority sought.—General commodities, including classes A and B explosives, moving in express service, (1) between White River Junction, Vt., and Whitefield, N.H., from White River Junction over U.S. Highway 5 to Wells River, Vt., thence over U.S. Highway 302 to Littleton, N.H., and thence over New Hampshire Highway 116 to Whitefield, and return over the same route, serving the intermediate points of Fairlee and Bradford, Vt., and Woodsville and Littleton, N.H., and (2) between Wells River and Newport, Vt., from Wells River over U.S. Highway 5 to Newport, and return over the same route, serving the intermediate points of St. Johnsbury, Barton, and Orleans, Vt.

Protestants.—Gay's Express, Inc., and P. B. Mutrie Motor Transportation, Inc.

NO. MC-66562 (SUB-NO. 1594)

Authority sought.—General commodities, including classes A and B explosives, moving in express service, between Manchester, N.H., and White River Junction, Vt., over a regular route, from Manchester over Interstate Highway 93 to Concord, N.H., thence over U.S. Highway 4 to New Hampshire Highway 4A, thence over New Hampshire Highway 4A to its junction with U.S. Highway 4, thence over U.S. Highway 4 to White River Junction, and return over the same route, serving the

intermediate points of Concord, Potter Place, and Lebanon, N.H.

Protestants.—Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Gay's Express, Inc., H. P. Welch Co., and P. B. Mutrie Motor Transportation, Inc.

NO. MC-66562 (SUB-NO. 1595)

Authority sought.—General commodities, including classes A and B explosives, moving in express service, between Boston, Mass., and Portland, Maine, from Boston over U.S. Highway 1 to its junction with Interstate Highway 95, thence over Interstate Highway 95, to Portland, and return over the same route, serving no intermediate points.

Protestants.—Graf Bros., Inc., and P.B. Mutrie Motor Transportation, Inc.

NO. MC-66562 (SUB-NO. 1687)

Authority sought.—General commodities, including classes A and B explosives, moving in express service, between Hoosick Falls, N.Y., and Middlebury, Vt., over a regular route as follows: From Hoosick Falls over New York Highway 22 to North Hoosick, thence over New York Highway 67 to its junction with Vermont Highway 67, thence over Vermont Highway 67 to its junction with U.S. Highway 7, thence over U.S. Highway 7 to its junction with U.S. Highway 4 at Rutland, Vt., thence west over U.S. Highway 4 to its junction with Vermont Highway 3, thence over Vermont Highway 3 to its junction with U.S. Highway 7, and thence over U.S. Highway 7 to Middlebury, and return over the same route; and from the junction of U.S. Highway 7 and Vermont Highway 103 over Vermont Highway 103 to Chester, Vt., and return over the same route; serving the

intermediate points of North Bennington, Arlington, Manchester, Danby, Rutland, Proctor, Brandon, Ludlow, and Chester, Vt.

Protestants.—Gay's Express, Inc., Marcell's Motor Express Inc., P. B. Mutrie Motor Transportation, Inc., and P. S. Dubrey Trucking Co., Inc.

APPENDIX B

Joint board's statement of protestants' authorities, et cetera, in Sub-No. 1515

P. B. Mutrie Motor Transportation, Inc., of Waltham, holds authority to transport general commodities, with exceptions, but not excepting commodities requiring the use of special equipment, (1) over regular routes, between various points in Massachusetts and Rhode Island (not embracing any of the authority sought by applicant), and (2) over irregular routes, in truckload lots, insofar as here material, between Boston, on the one hand, and, on the other, points in Massachusetts and those in a described portion of New Hampshire. In addition, it holds authority to transport liquid commodities (with certain exceptions) between Boston and certain other points in Massachusetts, on the one hand, and, on the other, points in Massachusetts and New Hampshire. The carrier operates over 100 tractors and 221 tank trailers. In addition, it operates some low-bed trailers and pole trailers. Terminals, insofar as here important, are maintained at Waltham and Manchester. This carrier does not hold authority to render the type of service here proposed, and its principal objection to a grant is limited to commodities moving in bulk, and those requiring the use of special equipment. It asks that a grant of authority be restricted to prevent the performance of such services.

Graf Bros., Inc., of Salisbury, Mass., holds authority insofar as here material, to transport general commodities, with exceptions, over regular routes, (1) between Manchester and Boston, and (2) between Manchester and Dover. Included is authority to serve Newburyport, Hampton, and Portsmouth. In addition, it holds irregular route authority to transport the same commodities between Boston and a described portion of New Hampshire. Terminals are maintained at Boston, Salisbury, Manchester, and Portland, and the carrier operates 50 tractors and 29 trailers. Protestant performs a regular daily scheduled service between its authorized points, and about 15 schedules are operated daily between Boston and Newburyport. It provides pickup and delivery service, and operates in conjunction with carloading companies and airlines in Boston.

H. P. Welch Co., of Somerville, holds authority, insofar as here material, to transport general commodities, with exceptions, over regular routes, (1) between Boston and Concord, N.H., serving the intermediate points of Nashua and Manchester, and (2) between Manchester and White River Junction, Vt. It operates 52 trucks, 99 tractors, 188 trailers, and 9 pickup trucks, and has terminals at Keene, Manchester, and Claremont, N.H., Rutland, Barre, and Burlington, Vt., West Springfield and Somerville, Mass., and Jersey City, N.J. It operates daily schedules between points mentioned above, and handles a large volume of traffic between Somerville (a point within the commercial zone of Boston) and Manchester. Nashua shipments are handled through the Manchester terminal. It handles traffic in conjunction with airlines, and it is interested in handling traffic for applicant. It is not interested in part two of the application; namely, that part involving Dover, Portsmouth, Hampton, and Newburyport.

Law Motor Freight, Inc., of Nashua, holds authority, insofar as here material, to transport general commodi-

t'.s, with exceptions, over a regular route, between Boston and Manchester, serving all intermediate points, including Nashua. It also holds authority to transport specified commodities from points in New Hampshire to points in Massachusetts, Rhode Island, Connecticut, and New York. Terminals are maintained at Boston, Nashua, and Keene, and its equipment consists of 38 straight trucks, 32 tractors, 43 van trailers, 4 open-top trailers, 2 dump trailers, a. 7 rack or flat-top trailers. Daily overnight service is provided between the points served, and it has handled traffic for some of the supporting shippers. It has handled some air express shipments, and also offered to transport shipments for applicant. This carrier holds no authority to serve the points outlined in part two of the application.

Auclair Transportation, Inc., of Manchester, holds authority, insofar as here material, to transport general commodities, with exceptions, over a regular route, between Boston and Plymouth, N.H., serving all intermediate points, including Manchester and Nashua. It also holds regular route authority between various points in New Hampshire, including Manchester, Exeter, Suncook, Portsmouth, and Dover. It does not, however, hold authority to serve all points embraced in part two of the application. Terminals are maintained at Charlestown, Mass., and Manchester, and protestant owns and operates 20 trucks, 25 tractors, and 37 trailers. It generally provides overnight service between Manchester and Boston, and it has an average of 14 vehicles daily in Boston. Air express shipments are handled daily, and it believes that the involved traffic can be adequately handled for applicant.

J.E. Faltin Motor Transportation, Inc., of Manchester, holds authority, insofar as here material, to transport general commodities, with exceptions, between Boston and Manchester, and between Boston and Dover, over

regular routes, serving numerous points including Nashua, Newburyport, Hampton, and Portsmouth. It operates 40 trucks, 82 tractors, 115 trailers, and 30 tank vehicles. Terminals are maintained at Boston, Manchester, and Pittsfield, N.H., and call stations are maintained at, among other places, Portsmouth, Dover, and Newburyport. This carrier operates a daily regular scheduled service between Boston and Manchester and between Dover and Boston, and it handles a large volume of traffic. It believes a grant of the application would have the effect of placing a new competitive carrier in the field, and it expressed a desire to establish and operate schedules to meet the needs of Railway Express.

Alvin R. Holmes, doing business as Holmes Transportation Service, and/or Jones Express, of Worcester, Mass., holds authority to transport general commodities, with exceptions. The Jones division, insofar as here important, operates (1) between Manchester and New Bedford, Mass., and (2) between Boston and White River Junction. That division operates 35 trucks, 14 tractor-trailer units, 2 flat beds, and 4 refrigerated trucks. Holmes' rights are irregular route between all or specified points in Massachusetts, Rhode Island, Connecticut, and parts of New York and New Jersey. It operates 11 trucks and 3 tractor-trailer units. Pursuant to both, one round trip daily schedule is maintained between the Massachusetts and New Hampshire points served. They are interested in providing service for Railway Express.

Taylor's Express Co., of Haverhill, Mass., is controlled by Alvin R. Holmes, and as previously shown Jones Express is affiliated with or controlled by Holmes. Taylor's holds authority to transport general commodities, with exceptions, over specified routes, (1) between Boston and Haverhill and Merrimac, Mass., on the one hand, and, on the other, points in New Hampshire located in Rockingham and Strafford Counties, and in that part of

Hillsboro County east of New Hampshire Highway 13. Under this authority it can serve Hampton, Portsmouth, Dover, Manchester, and Nashua. It owns and operates 15 trucks, 1 pickup truck, 4 tractors, and 7 trailers. With respect to the points here involved, Taylor's provides its own pickup and delivery service at Portsmouth, Dover, and Hampton, and the pickup and delivery service at Nashua and Manchester is provided by Holmes and Jones, respectively. Taylor's renders a peddle-type operation, and is actively serving points in the areas involved.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 5th day of October, A. D. 1962.

No. MC-66562 (Sub-No. 1515)

RAILWAY EXPRESS AGENCY, INCORPORATED, EXTENSION—NASHUA, N. H.

No. MC-66562 (Sub-No. 1577)

RAILWAY EXPRESS AGENCY, INCORPORATED, EXTENSION—NEWPORT, VT.

No. MC-66562 (Sub-No. 1594)

RAILWAY EXPRESS AGENCY, INCORPORATED, EXTENSION—WHITE RIVER JUNCTION, VT.

No. MC-66562 (Sub-No. 1595)

RAILWAY EXPRESS AGENCY, INCORPORATED, EXTENSION—BOSTON

No. MC-66562 (Sub-No. 1687)

RAILWAY EXPRESS AGENCY, INCORPORATED, EXTENSION—MIDDLEBURY, VT.

It appearing, That by its consolidated report and order in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595), the Commission, division 1, granted the applications in certain respects; and that petitions for reconsideration were thereafter filed by certain protestants and intervener, to which replies were filed by applicant;

It further appearing, That the applications in No. MC-66562 (Sub-Nos. 1515 and 1687) have been the subjects of separate initial reports and recommended orders, to which exceptions were thereafter filed by certain protes-

tants and by intervener, embracing requests for oral argument, to which replies were filed by applicant;

And it further appearing, That by order of November 20, 1961, the said proceedings in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595) were reopened for oral argument and were assigned for oral argument in conjunction with those in No. MC-66562 (Sub-Nos. 1515 and 1687), which was heard on January 16, 1962;

Upon consideration of the records in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595), and of the petitions for reconsideration therein and the replies thereto; and good cause appearing therefor:

It is ordered, That the proceedings in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595) be, and they are hereby, reopened for reconsideration on the present records, and that the order of the Commission, division 1, referred to in the first appearing paragraph above, be, and it is hereby, vacated and set aside;

And it is further ordered, That the said petitions for reconsideration be, and they are hereby, denied, except to the extent that the proceedings are reopened for reconsideration on the present records;

And it further appearing, That consideration of the matters and things involved in each of the embraced proceedings has been given and that the Commission, on the date hereof, has made and filed its report on oral argument (and on reconsideration in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595)) herein containing its findings of facts and conclusions thereon, which report, and the prior report in No. MC-66562 (Sub-Nos. 1577, 1594, and 1595), are hereby made a part hereof:

It is further ordered, That the said applications, except to the extent granted in the said report herein be, and they are hereby, denied.;

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

HAROLD D. MCCOY,
Secretary.

[SEAL]

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-66562 (Sub-No. 1577)[1]

Railway Express Agency, Incorporated, Extension—Newport, Vt.

Decided February 14, 1961

In each of the embraced proceedings, public convenience and necessity found to require operation by applicant, as a common carrier by motor vehicle of general commodities, moving in express service, between specified New England points, over described regular routes, serving certain intermediate points, subject to certain conditions. Issuance of certificates approved upon compliance by applicant with certain conditions, and applications in all other respects denied.

William H. Marx for applicant.

Kenneth B. Williams for protestants.

Report of the Commission

Division 1, Commissioners Murphy, Webb, and Herring

By Division 1:

These proceedings were heard on separate records and were the subject of separate reports and recommended

[1] This report also embraces No. MC-66562 (Sub-No. 1594), Railway Express Agency, Incorporated, Extension—White River Junction, Vt.; and No. MC-66562 (Sub-No. 1595), Railway Express Agency, Incorporated, Extension—Boston.

orders of the joint boards. As they involve the same applicant and present related issues, they will be disposed of here in a single report. Exceptions to the order recommended by the joint board in each proceeding were filed by protestants, and applicant replied.

In No. MC-66562 (Sub-No. 1577), by application October 15, 1959, Railway Express Agency, Incorporated, of New York, N.Y., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, including class A and class B explosives, moving in express service, (1) between White River Junction, Vt., and Whitefield, N.H., from White River Junction over U.S. highway 5 to Wells River, Vt., thence over U.S. Highway 302 to Littleton, N.H., and thence over New Hampshire Highway 116 to Whitefield, and return over the same route, serving the intermediate points of Fairlee and Bradford, Vt., and Woodsville and Littleton, N.H., and (2) between Wells River and Newport, Vt., over U.S. Highway 5, serving the intermediate points of St. Johnsbury, Barton, and Orleans, Vt.

In No. MC-66562 (Sub-No. 1594), the same applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, including class A and class B explosives, moving in express service, between Manchester, N.H., and White River Junction, Vt., from Manchester over Interstate Highway 93 to Concord, N.H., thence over U.S. Highway 4 to its junction with New Hampshire Highway 4A, thence over New Hampshire Highway 4A to its junction with U.S. Highway 4, thence over U.S. Highway 4 to White River Junction, and return over the same route, serving the intermediate points of Concord, Potter Place, and Lebanon, N.H.

In No. MC-66562 (Sub-No. 1595), the same applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, moving in express service, between Boston, Mass., and Portland, Maine, from Boston, over U.S. Highway 1 to its junction with Interstate Highway 95, thence over Interstate Highway 95 to Portland, and return over the same route, serving no intermediate points.

In all three of the embraced applications, applicant requests that the authority sought be granted subject to the restrictions that the service performed by applicant shall be limited to that which is auxiliary to or supplemental of express service, and that the shipments transported by applicant shall be limited to those moving on a through bill of lading or express receipt. Gay's Express, Inc., hereinafter called Gay, opposes the Sub-Nos. 1577 and 1594 applications; P. B. Mutrie Motor Transportation, Inc., hereinafter called Mutrie, opposes all of the applications; Alvin R. Holmes, doing business as Holmes Transportation Service or Jones Express, and H. P. Welch Co., hereinafter called Holmes and Welch, respectively, oppose the Sub-No. 1594 application; and Graf Bros., Inc., hereinafter called Graf, opposes the Sub-No. 1595 application.

The joint boards hearing the three embraced applications recommended that each be granted, subject to the conditions requested in the applications and subject also to the further condition that the authority granted, to the extent it authorizes the transportation of dangerous explosives, shall be limited in point of time to a period expiring 5 years from the date of issuance of the certificates, and to the condition that the Commission, in the future, may impose such future conditions as it may find necessary in order to restrict applicant's operations to service which is auxiliary to or supplemental of air or railway express service.

Substantially similar exceptions have been filed on behalf of the several protestants in all three preceedings. Protestants collectively contend that no need for service has been demonstrated which cannot be met by existing carriers; that a grant of authority to transport "general commodities, moving in express service," is not supported by the evidence and amounts to a grant of unrestricted general-commodity authority without the necessary proof of public need; that the transportation of commodities in bulk and those requiring special equipment should have been excluded from the recommended grants of authority; that a railroad instrumentality cannot be granted authority unless its service is limited to the transportation of shipments having a prior or subsequent movement by rail; and that under the decision in *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1, a grant of unrestricted trucking rights may not be made to a rail agency. Applicant replies that it has sustained its burden of proving that the proposed service is needed; that the authority recommended to be granted is of a type consistently issued by this Commission over a period of 20 years; that "general commodities, moving in express service" are words of art clearly defined by prior Commission decisions; that the evidence shows a need for the transportation of local interstate shipments which would not have any prior or subsequent movement by rail or air; that protestants are unable to transport or are uninterested in transporting express shipments or in providing the incidental services peculiar to express service; that protestants will not be adversely affected by a grant of the authority sought; and that it seeks only to continue its present express service by motor vehicle in lieu of discontinued train service.

The evidence, the joint boards' recommendations, the exceptions, and the replies have been considered. We find the statements of fact contained in the joint boards'

reports to be accurate in all material respects, and we adopt those statements as our own.

Applicant's status as a motor common carrier, its motor vehicle operations, its organization, and functions are described in *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161, and need not be repeated here. It is engaged in the transportation of express shipments throughout the United States and in certain foreign countries. It conducts its operations through the utilization of the facilities of motor, rail, water, and air carriers. In addition, it operates about 10,000 trucks throughout the country, principally in collection, delivery, and transfer service within terminal areas, but also to a considerable extent in line-haul service.

The applications have been filed to enable applicant to provide express service by motor vehicle at points which it formerly served through rail facilities now no longer available. By a fourth application, No. MC-66562 (Sub-No. 1515), it seeks authority to operate over routes between Boston, Mass., and Manchester, and between Boston and Dover, N.H. This last application has been the subject of a hearing by a joint board, but no recommended order has as yet been served. In addition, applicant holds authority in certificate No. MC-66562 (Sub-No. 1482) to transport general commodities, moving in express service, between Portland and Rockland, Maine, over a described route, serving several intermediate points. This authority, in addition to containing the restrictions proposed by applicant here, is restricted to the transportation of traffic having an immediately prior or subsequent, movement by rail or air. Under its existing authority, the authority sought in the three instant applications, and that sought in its Sub-No. 1515 application, applicant would provide a coordinated all-motor service between Boston, on the one hand, and, numerous points in Vermont, New Hampshire, and

Maine, on the other. Express service was formerly provided to and from these points in the trains for the Boston and Maine Railroad and the Canadian Pacific Railway Company. On June 1, 1958, the Boston & Maine discontinued passenger service between White River Junction and Whitefield, while substituted motor-for-rail service between these points was discontinued on September 13, 1959. In October 1959 the Boston & Maine discontinued passenger service between Boston and White River Junction, and between Boston and Portland, and the Canadian Pacific discontinued passenger service between White River Junction and Newport. What few passenger trains are still operated by the Boston & Maine in this area are made up of self-propelled "Budd" cars, which afford little or no space for the transportation of cargo. Applicant now holds temporary authority to provide service between the points involved in the three instant proceedings, and it is now providing all-motor service between these points.

In support of these applications, applicant presented testimony of certain employees and of shippers located at points along the proposed routes. Generally, applicant transports small shipments averaging in weight about 40 pounds each, and it handles a wide variety of commodities. It transports such things as ballots, chinaware, drugs, clothing, advertising matter, cremated remains, garden seeds and bulbs, eggs, live rabbits and rats, flowers, films, fish, fruit, and jewelry. Many of the commodities handled are of high value and require a high degree of protection. The vehicles used in applicant's service are equipped with safes and armed guard service is offered.

Five shippers support the Sub-No. 1577 application. One distributes scales at St. Johnsbury; another is a manufacturer of taps and dies at Lyndonville, Vt., but would utilize applicant's service at St. Johnsbury; the third manufacturers sportswear at Newport; the fourth

is a furniture manufacturer at Orleans; and the fifth, also located at Orleans, manufactures card tables and chairs. These shippers used applicant's express service when its shipments were handled by rail, and they wish to continue to have such service available.

The Sub-No. 1594 application is supported by 10 shippers, 3 of whom are located at Concord, 4 at New London, N.H., and 1 each at Andover, N.H., Lebanon, and White River Junction. All of these shippers use applicant's express service in addition to motor-carrier service. As a general practice, they use express service for low-volume, high-value shipments, and shipments which require protective or expeditious service. Some use the air express service provided by applicant. These shippers have found that applicant provides an expedited and specialized form of transportation throughout the United States, and that it assumes complete responsibility for a through movement from and to distant points. They desire the continuance of applicant's express service.

Four shippers located in or near Portland support the Sub-No. 1595 application. One of these shippers is a distributor of industrial tractors and roadbuilding equipment, and uses express service primarily for the inbound transportation of small shipments of repair parts that must be expedited. Another of the Portland shippers is a paper manufacturer, another ships lobsters, and the last is a retailer of clothing. These shippers frequently require expeditious transportation to and from numerous points throughout the country. They consider applicant's daily service essential to their business operations.

Mutrie is a motor common carrier authorized to transport (1) general commodities, including commodities requiring special equipment, between specified points and areas in Massachusetts, Rhode Island, and New Hampshire, and (2) a variety of liquid commodities, in bulk, in

tank vehicles, between numerous points and areas in New England. It opposes these applications primarily because it fears that a grant of authority not expressly restricted would authorize applicant to transport bulk liquids and commodities which because of size or weight require the use of special equipment.

Gay holds authority to transport general commodities, with the usual exceptions, over a network of regular routes extending between points in Vermont, New Hampshire, Massachusetts, Connecticut, and New York. It serves Manchester and all of the points involved in the Sub-No. 1577 application except Littleton and Whitefield. It has terminals at St. Johnsbury, White River Junction, Manchester, and Boston, and operates 16 trucks, 62 tractors, and 128 trailers.

Holmes is a regular-route general-commodity motor common carrier operating between Boston, on the one hand, and, on the other, numerous points pertinent to the Sub-No. 1594 application. It provides overnight service from Boston to points such as Manchester, Concord, Potter Place, Lebanon, and White River Junction. Welch, which also opposes the Sub-No. 1594 application, is a motor common carrier of general commodities, with the usual exceptions, operating over regular routes extending between Boston, on the one hand, and, on the other, Concord, Manchester, Potter Place, Lebanon, and White River Junction. Graf, which opposes only the Sub-No. 1595 application, is also a motor common carrier of general commodities, with exceptions, whose routes, as pertinent, extend between Boston and Portland.

DISCUSSIONS AND CONCLUSIONS

Protestants question the whole concept of "railway express service" as performed in motor vehicles, and challenge this Commission's right to issue applicant authority free of certain restrictions. The service provided by

applicant as a carrier of express, whether operating its own motor-vehicle equipment or functioning through use of the facilities of rail carriers or of independent motor carriers, has been considered many times. In *Railway Exp. Agency, Inc., Determination of States, supra*, it was found that when operating its own motor vehicles in interstate commerce, applicant is subject to the provisions of part II of the Interstate Commerce Act. The type of service which may be performed by a carrier authorized to transport "express" or "general commodities moving in express service" was the subject of careful consideration in *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, and we believe, in spite of protestants' arguments, that the scope of such authority is well defined and well recognized in the transportation industry. Among other things, it was stated in the *Arrowhead* case that express service constitutes the transportation of any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security. Thus Mutrie's fears that applicant may invade the field of heavy hauling or bulk transportation are groundless. Furthermore, it is also apparent that Graf, Gay, Holmes, and Welch, whose authorities are restricted against the transportation of commodities of unusual value, are not authorized to perform as complete a service as that ordinarily performed by applicant. The *Arrowhead* case goes on to point out that the carrier of express must provide such care or security as is required by the nature of the commodities which it handles; must provide equally expeditious transportation and careful handling of all shipments, regardless of their volume, special demands, or value; and must perform actual operations between authorized points upon firmly established schedules allowing the minimum practicable highway transit time.

It has long been recognized that the service provided by applicant is different in many respects from that af-

forded by a general-commodity carrier. In *Railway Exp. Agency, Inc., Extension—Durant-Kosciusko*, 34 M.C.C. 111, 114, it was said:

> We have consistently recognized certain fundamental differences between express service and ordinary freight service, both by rail and by motor vehicle. Express service contemplates the expedited handling and transportation of comparatively small individual shipments often of considerable value and generally at premium rates. The service may be said to be competitive with ordinary freight service to a very limited extent only, and the mere fact that it can and does survive in competition with general freight service conducted generally at lower rates is indicative of the inherent difference between the two services. Since speed in handling is one of the principal characteristics of express service, it is usually conducted through the medium of passenger trains and passenger buses rather than by rail-freight and motor-freight service. * * *

With the diminution of passenger traffic during recent years, the resulting curtailment of passenger train service and the elimination of numerous station stops have required applicant to make other arrangements in order to maintain adequate express service. In many instances it has been granted motor-carrier operating authority to enable it to carry on by truck the service which it formerly provided using passenger trains, but which could no longer be provided because discontinuance of passenger schedules had left an area with no such service or with passenger service available only at inconvenient times. See, for example, *Railway Exp. Agency, Inc., Ext.—West Unity-Middletown*, 31 M.C.C. 363; and *Railway Exp. Agency, Inc., Ext.—Washington-Harrisonburg*, 33 M.C.C. 671. Such a situation exists here. It is clear that a substantial volume of express traffic is presently moving from and to points on the routes involved in these

three applications. Other than applicant's service presently performed under temporary authority, there is no motor express service available between these points. We are convinced, therefore, that a permanent express service by motor vehicle is needed in place of that formerly provided by applicant through the use of passenger trains and substituted motor-for-rail service. Because of the nature of express service, discussed above, and the fact that it is competitive with the service of general freight carriers to a limited extent only, we believe that the continuation of applicant's service by use of motor vehicles will neither change the existing competitive situation in the area nor adversely affect the operations of existing motor carriers.

Remaining for consideration is the matter of what, if any, restrictions should be placed upon the authority to be granted. Applicant, as a rail instrumentality, is ordinarily granted authority so conditioned that the service which it performs will be limited to that which is auxiliary to and supplemental of its rail and air express service. Most of applicant's outstanding operating authority is subject to the following or similar restrictions:

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of air or railway express service.

2. Shipments transported shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air.

3. Such further conditions as the Commission, in the future, may find it necessary to impose in order to restrict applicant's operations to those which are auxiliary to or supplement of air or railway express service.

These restrictions are similar to those generally imposed in certificates issued to rail carriers or their subsidiaries authorized to perform a service auxiliary to and supplemental of rail service. The first, or auxiliary and supplemental restriction, corresponds to that generally imposed in motor-carrier certificates issued to rail instrumentalities authorized to transport general freight. It has the effect of limiting applicant to the transportation of air or railway express traffic, moving at express rates and upon express billing. Compare *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 55 M.C.C. 567, 584. In order to insure that an auxiliary and supplemental service remains as such, a condition such as the second one outlined above, limiting applicant to the transportation of traffic having an immediately prior or subsequent movement by rail—the so-called rail-haul restriction—is ordinarily imposed.

These restrictions are designed to prevent applicant from engaging in motor operations unconnected with its rail or air express service. Applicant agrees to the imposition of the usual auxiliary and supplemental restrictions, but contends that if rail-haul restrictions are imposed here, it will not be able to provide local interstate service between points on the routes under consideration. Protestants contend that we should impose such restrictions here, and that failure to do so would result in a grant of virtually unrestricted authority allowing applicant to invade the province of the general freight carriers.

We agree with protestants that a rail-haul restriction should be imposed in situations in which an express service, shown to be required by the public convenience and necessity, can be performed in connection with rail or air express service. Where a needed express service cannot be performed in this way, however, this restriction may properly be modified or omitted. For example, if there

is a need for the transportation of local express shipments between points on the particular route under consideration, the rail-haul condition may be modified so that it applies only to shipments moving from or to points beyond those on that route, but does not apply to merely local shipments. *Railway Exp. Agency, Inc., Extension —Dexter, Mo.*, 83 M.C.C. 368. We believe that a restriction of this kind is appropriate in the case of the Sub-No. 1595 application. The authority to be granted there will be restricted so as to enable applicant to provide local express service between Boston and Portland, but to require that shipments moving from or to points beyond have an immediately prior or subsequent movement by rail.[2]

The rail-haul restriction has also been omitted where for some other reason the public interest requires an all-truck express service. *Railway Exp. Agency, Inc., Ext. —Washington-Harrisonburg, supra*, presented a situation in which the rail service in conjunction with which the proposed motor service would have had to be utilized was not such as could be conveniently used by applicant. It was found that the use of this rail service would necessitate transfers and would result in delays in transit, and that if a rail-haul restriction or a key-point restriction were imposed, the flexibility and expedition of applicant's express service would have been considerably lessened. This report notes: "Flexibility and expedition are two of the principal characteristics of express service which should be preserved if that service is to measure up to the

[2] Applicant apparently contemplates tacking the authority sought in the Sub-No. 1595 application with that now held by it in its Sub-No. 1482 certificate authorizing operation between Portland and Rockland to provide an all-truck service from Boston to Maine points beyond Portland. As the latter authority is restricted to the transportation of shipments having an immediately prior or subsequent movement by rail however, such a through operation could not be performed, regardless of the form of authority granted here in the Sub-No. 1595 application.

standards established in the past" 33 M.C.C. at 675. It was found there that no such restriction should be imposed.

The Sub-Nos. 1577 and 1594 applications before us now present factual situations similar to that in the case just discussed. As a result of the curtailment of passenger-train service in New England, applicant, in operating over the routes involved in the Sub-Nos. 1577 and 1594 applications, has virtually no suitable passenger trains with which it may connect. The only exception is a train serving White River Junction which operates through Springfield, Mass., but does not serve Boston. If a rail-haul restriction were imposed here, then, shipments moving from, to, or through Boston would have to move by freight trains or in a highly circuitous manner by passenger trains. In either case, the "flexibility and expedition" which are characteristics of express service would not be preserved. We believe that this consideration, coupled with the fact that there is no permanently authorized motor express service available in the area under consideration justifies grants of authority in these two proceedings without the rail-haul restriction.

In No. MC-66562 (Sub-No. 1577), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, moving in express service, (1) between White River Junction, Vt., and Whitefield, N.H., from White River Junction over U.S. Highway 5 to Wells River, Vt., thence over U.S. Highway 302 to Littleton, N.H., and thence over New Hampshire Highway 116 to Whitefield, and return over the same route, serving the intermediate points of Fairlee and Bradford, Vt., and Woodsville, and Littleton, N.H., and (2) between Wells River and Newport, Vt., over U.S. Highway 5, serving the intermediate points of St. Johnsbury, Barton, and

Orleans, Vt. subject to the conditions numbered 1, 2, 3, and 4 as set forth in the appendix hereto.

In No MC-66562 (Sub-No. 1584), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, moving in express service, between Manchester, N.H., and White River Junction, Vt., from Manchester over Interstate Highway 93 to Concord, N.H., thence over U.S. Highway 4 to its junction with New Hampshire Highway 4A, thence over New Hampshire Highway 4A to its junction with U.S. Highway 4, thence over U.S. Highway 4 to White River Junction, and return over the same route, serving the intermediate points of Concord, Potter Place, and Lebanon, N.H., subject to the conditions numbered 1, 2, 3, and 4 as set forth in the appendix hereto.

In No. MC-66562 (Sub-No. 1595), we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, moving in express service, between Boston, Mass., and Portland, Maine, from Boston over U.S. Highway 1 to its junction with Interstate Highway 95, thence over Interstate Highway 95 to Portland, and return over the same route, serving no intermediate points, subject to the conditions numbered 1, 3, 4, and 5 as set forth in the appendix hereto.

We further find that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder; that certificates authorizing such operations should be granted; and that the applications in all other respects should be denied.

Upon compliance by applicant with the provisions of sections 215, 217, and 221(c) of the act and with our rules

and regulations thereunder, within the time specified in the order entered concurrently herein, appropriate certificates will be issued. An appropriate order will be entered.

APPENDIX

Conditions imposed in the certificates authorized to be granted

1. The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of rail or air express service.

2. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.

3. The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the date of the certificate.

4. Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxilliary to, or supplemental of, express service.

5. Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air, except that applicant may render local express service solely between Boston, Mass., and Portland, Maine.

APPENDIX D

NATIONAL TRANSPORTATION POLICY

[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

Sec. 5. [As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.] [49 U.S.C. § 5.]

* * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such

modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Sec. 206. [August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.] [49 U.S.C. § 306.]

* * * *

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue

such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

Sec. 207. [August 9, 1935.] [49 U.S.C. § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

TERMS AND CONDITIONS OF CERTIFICATE

Sec. 208. [August 9, 1935.] [49 U.S.C. § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and

such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

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No. 724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

AUCLAIR TRANSPORTATION, INC., *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM.

WILLIAM J. TAYLOR,
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IN THE

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AUCLAIR TRANSPORTATION, INC., *et al.*,

Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM.

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, Railway Express Agency, Incorporated (hereinafter called R E A Express), appellee, moves that the judgment of the district court be affirmed.[1]

Statement.

This is a direct appeal from a final judgment entered on September 11, 1963, by a three-judge district court convened pursuant to 28 U. S. C. 2284 and 2325 dismissing appellants' complaint which sought to set aside an order of the Interstate Commerce Commission. R E A Express was a party to the proceeding before the Commission and was permitted to intervene as a party defendant before the district court pursuant to the provisions of 28 U. S. C. 2323.

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[1] The Opinion of the district court is reported at 221 F. Supp. 328.

The Report and Order of the Interstate Commerce Commission,[2] which is the subject of this appeal, embraces five separate applications by R E A Express to operate as a common carrier by motor vehicle, in interstate and foreign commerce, over specified routes in the New England area, serving some 34 points in the States of Massachusetts, New Hampshire and Vermont, connecting with other already established motor vehicle routes serving the States of Maine and New York (J. S. 41; 91 M. C. C. 312).

R E A Express applied for and received temporary authority pursuant to Section 210a of the Interstate Commerce Act, 49 U. S. C. 310a, to operate the routes in question pending a final determination of these proceedings (Subs 1498TA, 1560TA, 1571TA, 1572TA, 1575TA, and 1683TA). Subsequently five applications for permanent authority were filed and heard separately. Each was the subject of a favorable report by either a Joint Board[3] or a Hearing Examiner. Upon exceptions by the present appellants, three of the applications (Sub Nos. 1577, 1594 and 1595) were the subject of a unanimous favorable report and order by Division 1 of the Commission (J. S. 102). These three applications, plus Sub Nos. 1515 and 1687, were then heard by the entire Commission and were the subject of the unanimous report and order here under attack. Finally, the Commission's order was reviewed by a three-judge court which unanimously affirmed the Commission decision.

The applications here under review were necessitated by changing technology in transportation. The express busi-

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[2] *Railway Express Agency, Incorporated, Extension—Nashua, N. H.*, 91 M. C. C. 311.

[3] Joint Boards are made up of representatives of the states through which the proposed routes will operate and are established pursuant to 49 U. S. C. 305(a).

ness began 125 years ago, moving by boat from Boston, Massachusetts, to Providence, Rhode Island, and on to New York by train. It grew rapidly, expanding to the West by use of stage coach and pony express. With the development of the fast passenger train, in the late 19th and early 20th centuries, this became the dominant method of line-haul movement. The development of air service gave rise to air express which continues to be a flourishing part of R E A's business.

In the 1930's, and progressing even more rapidly in recent years, the disappearance of passenger train service has made it increasingly necessary for R E A Express to seek and obtain operating authority from the Interstate Commerce Commission to operate its surface line-haul service by motor vehicle in order that it might continue to offer the public the type of service which it requires and to which it is entitled. In fact, when Part II of the Interstate Commerce Act was enacted in 1935, R E A Express was already operating some 250 motor carrier routes in lieu of discontinued rail service. It applied for and received "grandfather" certificates pursuant to Section 206 of the Motor Carrier Act. 49 U. S. C. Section 306.[4] The discontinuance of passenger train service in the New England area forced R E A Express to seek authority to operate motor vehicles over the routes here in question so that the New England area might continue to have express service available as a part of its transportation system.

Solely because the capital stock of R E A Express is owned by some 60 railroads, appellants would have this Court declare that any certificate of public convenience and necessity issued to R E A Express for over-the-highway

[4] *Railway Express Agency, Incorporated, Applications*, MC 66562 and Subs 1-181.

operation must contain a restriction which would require that all traffic handled have an immediately prior or subsequent movement by rail. Since the very reason for the applications in the first place is the disappearance of rail passenger service, it is quite obvious that appellants' contention, if upheld, would drive out of existence a transportation company which has been providing a needed service to the public from the stage coach to the jet age. It is indeed ironic that appellants seek to destroy express service, which is in some respects a competitor, by relying upon Section 5(2)(b) of the Interstate Commerce Act, 49 U. S. C. 5(2)(b)—a section clearly designed to foster and preserve competition. Both the Commission and the district court correctly declined to be parties to so obvious a distortion of congressional policy.

Argument.

1. This appeal presents no substantial question warranting plenary review by this Court. There can be no doubt that the district court correctly concluded that the Commission acted within its statutory authority as interpreted by this Court on many occasions. Perhaps the best evidence of this fact appears from appellants' own statement of Questions Presented. The very first question assumes a state of facts which is at odds with the record in this proceeding, at odds with the findings and conclusions of the Commission, and at odds with the conclusions of the district court. In short, while it may be interesting to speculate "whether the Interstate Commerce Commission, in the absence of 'special circumstances' . . . may authorize Railway Express Agency, Inc., . . . to conduct motor common carrier operations not restricted to traffic having an immediately prior or subsequent movement by rail," such speculation has nothing to do with the issues presented by this case. Both the district court and the Commission

have specifically found "special circumstances" and having so found, there can be no further question that the result reached by the Commission in this proceeding is well within the discretion vested in it by Congress. *American Trucking Associations, Inc.* v. *United States*, 355 U. S. 141 (1957); *American Trucking Associations, Inc.* v. *United States*, 364 U. S. 1 (1960).

Appellants' Jurisdictional Statement attempts to create the impression that the Commission in this proceeding has treated R E A Express differently from other rail-affiliated motor carriers. The fact is that the Commission specifically refused to treat R E A differently even though, in the light of history and the purpose of Section 5(2)(b) of the Interstate Commerce Act (49 U. S. C. 5(2)(b)) it would appear that stock ownership by some 60 railroads is far different from the type of control Congress had in mind when it enacted that section. For purposes of this case, R E A Express has not contested the finding that it is "affiliated with the railroads within the meaning of Section 5(2)(b)."

Appellants themselves acknowledge that this Court has clearly held in the *American Trucking Associations* cases, *supra*, that the mere finding that R E A Express is an affiliate of the railroads does not in any way preclude the Commission from granting it operating rights under Section 207 of the Act (49 U. S. C. 307). At page 9 of the Jurisdictional Statement appellants say:

> "The one exception to the rule against Commission approval of unrestricted motor-carrier operations by a railroad or a railroad affiliate is the 'special circumstances' test, and what constitutes such special circumstances is spelled out in *Rock Island M. Transit Co. Com. Car. Application*, 63 M. C. C. 91, 102 (1954), aff'd 355 U. S. 141 (1957): To receive unrestricted authority, the rail affiliate must not only

> establish that the grant of authority has not and will not result in undue restraint of competition, but it must also prove 'that public interest requires the proposed operation, which the authorized independent motor carriers have not furnished, except where it suited their convenience.' "

What appellants refuse to acknowledge is the undisputable fact that this case comes squarely within the stated exception. The Commission found, upon substantial evidence, that none of the appellants renders a service comparable to that of R E A Express and that there is a substantial public need for the continuation of such service. The district court, after a thorough review of the record, reached the same conclusion (J. S. 36). Under the clear pronouncements of this Court, having made such findings there can be no doubt that the Commission was well within its discretion when it issued the certificates in question.

In *American Trucking Associations* v. *United States*, 355 U. S. 141, the Commission issued an unrestricted certificate to Rock Island Motor Transit, a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad. The American Trucking Associations sought review of the Commission decision. The major ATA argument was precisely the one now reiterated by the same party in the Jurisdictional Statement in this case, i.e., that motor carrier operations of rail affiliates must be limited to those usable to public advantage in their rail service. This Court rejected that argument and held that (355 U. S. 151):

> "We repeat . . . that the underlying policy of Section 5(2)(b) must not be divorced from proceedings for new certificates under Section 207. Indeed the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' *But, for reasons we have stated, we*

> *do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a Section 207 proceeding.*" (Emphasis supplied.)

The Jurisdictional Statement in this case reveals appellants' obvious intent to re-argue the identical proposition that this Court flatly and unmistakably rejected when advanced by one of the same plaintiffs in the cited case.

In *American Trucking Associations v. United States*, 364 U. S. 1 (1960), after quoting the paragraph set forth above, the Court said (at page 11):

> "These, then, are the guiding principles which have been established by what has gone before and which mark the range of our inquiry in this case."

The Court found in the latter case that the Commission had failed to find "special circumstances" sufficient to meet the statutory test. In explaining the type of "special circumstances" required, the Court said (at pages 14, 15):

> "There is, for example, no finding that independent contract carriers were unable or unwilling to perform the same type of service as Pacific Motor."

2. In the instant case the Commission found precisely the conditions which this Court specifically held would constitute "special circumstances" but appellants steadfastly refuse to recognize this fact. Instead they argue that the district court erred when it concluded that the Commission did in fact find, upon substantial evidence, special circumstances. Thus appellants find themselves in the peculiar position of arguing that the Commission must find "special circumstances" and then attempting to explain away the fact that the Commission made precisely such a finding.

The difficulty in which appellants find themselves is that their effort to conjure up some issue worthy of plenary review by this Court requires that they attempt to ignore the clear language of the Commission's report. The report takes special note of the interpretation placed on the statutes by both itself and the Courts and finds specifically that existing motor carriers are in fact unable or unwilling to perform the type of service rendered by R E A Express. The Commission said (J. S. pages 83, 86; 91 M. C. C. at pages 340, 341, 342):

> ". . . because the express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for R E A to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist.
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> ". . . In each proceeding there are one or more protestants authorized to serve all of the points involved on one or both of the segments. All such carriers, however, hold authority restricted against the transportation of commodities of unusual value, *and thus are unable to perform the complete service shown to be required.* More important, though, is the fact that *none of these protestants renders regularly an express service;* for if they do, they have failed to so indicate on these records. Applicant, under temporary authority and before that in connection with passenger train operations, has been providing express service at the communities involved in both of these applications. Were protestants able to show that at any time they were effectively competing for and transporting express traffic, we might be able to accept their argument now that they are interested in and capable of doing so. But absent

> such proof, *we must view the evidence as supporting the conclusion that the protestants do not render regularly any express services.* In light of the need established for such services, the applications should be granted." (Emphasis supplied.)

How appellants can continue to assert that the Commission failed to find "special circumstances" in the face of this language is a mystery. The fact is that, notwithstanding a finding of "special circumstances," the Commission did not issue *unrestricted* certificates as contemplated in the two *American Trucking Associations* cases, *supra*. On the contrary it has specifically restricted the certificates to the type of service for which a need has been shown, i.e., express service.

Not only are the operating authorities subject to severe limitations designed to insure that they will be used only for carrying on an express business, but, in addition, as appears from restriction No. 4 (J. S. 89), the Commission has reserved the right to impose even further restrictions if the need should arise. It is obvious that the Commission did not begin to approach the limit of its authority as established by this Court. On the contrary, a denial of the applications would have been directly contrary to established congressional policy as declared both in the National Transportation Policy and in the provisions of the Interstate Commerce Act itself. This is especially true where, as here, the alleged congressional policy upon which appellants would have the Court rely to drive R E A Express out of existence is drawn from Section 5(2)(b)—a statute which was enacted to insure that competition in transportation would be preserved.

3. Appellants, not satisfied with the very limited authority granted herein, sought to have the courts substitute

their judgment for that of the Commission and require the Commission to impose an additional restriction which would limit the traffic handled over the routes in question to that which would receive a prior or subsequent movement on steel rails. The district court properly declined to do so. Since the very reason for the applications in the first place was the rapid disappearance of passenger train service in New England, the court observed that this additional restriction would be tantamount to putting R E A Express out of business and depriving the shippers of the very service for which a specific need had been found (J. S. 36, 37).

Appellants suggest that the omission of a so-called rail-haul limitation is a radical departure from past Commission practice in certificates issued to R E A Express. This is not a fact. As the Commission observes at page 39 of its report (91 M. C. C. at page 332), "the rail-haul restriction in R E A certificates is utilized simply to reflect the type of need shown in each case for the service proposed." As long ago as 1940, in *Railway Express Agency, Inc., Extension of Operations—Williamsport—Elmira*, 26 M. C. C. 747, the Commission issued operating authority to R E A which omitted any rail-haul restriction. See also *Railway Express Agency, Inc., Extension of Operations—Washington—Harrisonburg*, 33 M. C. C. 671 (1952).

The Commission has continued to omit the rail haul restriction whenever there is evidence that the public need would be frustrated by such a restriction. A few of such cases are cited in the margin.[5]

[5] *Railway Express Agency, Inc.—Cincinnati, Ohio and Connersville, Indiana*, MC 66562, Sub 733; *Railway Express Agency, Inc., Extension—Youngstown, Ohio*, MC 66562, Sub 865; *Railway Express Agency, Inc., Extension—York, Pa.*, MC 66562, Sub 905;

In short, the Commission has for many years recognized that the services of R E A Express should not be denied to the shipping public merely because steel rails are not involved in the performance of the service. It has long been held that the courts will not attempt to substitute their judgment for the long-standing exercise of Commission discretion in matters of this kind. The Commission is the body entrusted with the duty to preserve an adequate transportation system to meet the needs of this country. It has spoken. The district court has affirmed. The necessary steps to protect all of the legitimate interests have been taken. Appellants have failed in their efforts to impose conditions which would surely destroy express service. This Court has very recently pointed out that it is for the Commission, not the courts, ". . . to achieve a balance between the competing forms of transportation." *Arrow Transportation Company v. Southern Railway Company*, 372 U. S. 658.

4. Appellants' Question No. 4 again assumes a conclusion which is foreign to this case. It asserts that the Commission refused "to apply its long-standing definition of 'express service' to the proposed service." Nothing could be further from the fact. The Commission reviewed its long-standing definition of express service as developed in a long line of cases (J. S. 17, 91 M. C. C. 311 at 322) and

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Railway Express Agency, Inc., Extension—Harrisburg and Hagerstown, MC 66562, Sub 964; *Railway Express Agency, Inc., Extension—Deadwood, South Dakota*, MC 66562, Sub 972; *Railway Express Agency, Inc., Extension—Lima, Ohio and Frankfort, Ind.*, MC 66562, Sub 1013; *Railway Express Agency, Inc., Extension—Chenoaville, Ill.*, MC 66562, Sub 1069; *Railway Express Agency, Inc., Extension—Purcellville, Va.*, MC 66562, Sub 1085; *Railway Express Agency, Inc., Extension—Millville, N. J.*, MC 66562, Sub 1156; *Railway Express Agency, Inc., Extension—Wheeling, W. Va.*, MC 66562, Sub 1311; *Railway Express Agency, Inc., Extension of Operations—Newport, R. I.*, 31 M. C. C. 689.

concluded that there was no need to attempt to establish a new definition at this time. Having so concluded, the Commission then turned to the testimony in this record and determined that the evidence proved overwhelmingly that a public need exists for express service and that, if the service of R E A Express were to be discontinued in the territory involved, that public need would not be filled.

Appellants' argument that the Commission did not properly apply the definition is nothing more than an argument that the Commission's finding is not supported by substantial evidence. The district court recognized the utter futility of this argument in the face of the voluminous evidence in this record. The court said (J. S. pages 30, 31):

> "At oral argument the plaintiff motor carriers indicated that their quarrel was not with this definition, which has long been well-recognized in the transportation industry, see Transportation Activities of Arrowhead Freight Lines, 63 M. C. C. 573 (1955), but with the Commission's finding that the evidence showed a public need for such service. This argument was made in the face of voluminous evidence that there is such a need. . . ."

Indeed the evidence is not only voluminous, it is overwhelming in support of the Commission's finding of a public need. The characteristics of the need which express service fills are neither vague nor uncertain in this record. They are characteristics which have been a part of express service since its inception. They include such attributes as speed, protection, regularity, extreme care, special services such as re-icing, armed guard, armed surveillance, care of live animals, pickup and delivery from homes and places of business no matter whether the shipment be a small package or many hundreds of pounds, and no matter

whether the location be a college on the edge of town, an industry in the middle of town, or a lobsterman's wharf. No other carrier in existence has undertaken to provide the type of specialized service which is the everyday practice of R E A Express. The Commission so found and there is not a scintilla in this record to contradict that finding (J. S. page 84, 91 M. C. C. at page 340). No other carrier, including those who are individual appellants here and those who are members of the American Trucking Associations, has shown any willingness to meet the public need now met by R E A Express. Even the witnesses supplied by appellants admitted that they did not perform the same service as that offered by applicant. The testimony of one such witness was summarized by the Commission as follows (J. S. at page 51, 91 M. C. C. 319):

> "... Dubrey concedes that R E A performs generally a service which it is not accustomed to rendering, and that, while some shippers utilize both its service and that of R E A, the traffic handled by R E A is not the type which it, Dubrey, usually transports. Dubrey opposes the application in order to obtain any additional traffic within the purview of its authority."

When stripped of all window dressing, appellants' efforts in this case are quite obviously directed to the goal of skimming off whatever desirable traffic they might find in the traffic now being handled by R E A Express and permitting the public to fend for itself in the movement of traffic not regarded as desirable by the motor carrier industry. This aim is never more clear than when appellants turn to the argument that R E A's *rates* should have been considered by the Commission in determining whether there is a public need for R E A's *service*. The mere statement of the prop-

osition is it own refutation. What the argument amounts to is a contention that the Commission, having found R E A's service to be a service different from that of the motor carriers, and having found a public need for such service, should then refuse to grant a certificate to perform the needed service because it appears that the applicant may not charge the public a high enough rate for the service performed. The fallacy in this reasoning has been consistently recognized by the Commission and the courts for many years.

The efforts of motor carriers of freight to inject rate comparisons into express certificate cases began as long ago as 1941 when R E A Express first applied for motor carrier rights after the enactment of Part II of the Interstate Commerce Act (Act of August 9, 1935, c. 498, 49 Stat. 543). The Commission said:

> "This protestant fears that applicant will invade the field of freight service either directly or indirectly through the manipulation of tariff rates, rules, and regulations. In this connection, we have control over any rates, rules, and regulations which applicant might seek to establish for application on interstate traffic." *Railway Express Agency, Inc., Extension—West Unity—Middletown*, 31 M. C. C. 363, 371 (1941). See also *Railway Express Agency, Inc., Extension—Kenosha-Twin Lakes*, 31 M. C. C. 587 (1942).

In *Mistletoe Express Service—Extension—Texas*, 61 M. C. C. 737 (1953), the Commission said (at page 746):

> "As for exceptants' fear that applicant will invade the field of freight service either directly or indirectly through the manipulation of its rates, suffice it to say that we have control over any rates which applicant might seek to establish for application on interstate traffic and that, moreover, any unauthorized oper-

> ation can be made the subject of a formal complaint and corrective action. Compare *Transportation Activities of Arrowhead Freight Lines*, 61 M. C. C. 131."

The rule has been followed by the Commission throughout literally hundreds of application cases, and the courts have upheld this view, most recently reaffirmed by the district court in this case (J. S. 33). See also *Railway Express Agency* v. *United States*, 153 F. Supp. 738, 741 (1957); aff'd 355 U. S. 270. Indeed, the rule is so well settled that appellants' counsel did not even attempt to place any rate comparisons in the record in this proceeding until long after the hearings were completed, the record was closed, the initial decisions had been rendered and the matter was before the Commission for oral argument.

The wisdom of the rule is clear and unassailable. The proper level for a carrier's rates in general, or any given rate in particular, is first and foremost a function of the cost of providing that carrier's service to the public. In the case of R E A Express, the level of its rates must properly be considered in the light of the cost of providing the express service which it offers to the public. It would be improper, and directly contrary to the provisions of the Interstate Commerce Act which require the maintenance of reasonable rates by R E A Express (49 U. S. C. Section 1, *et seq.*), if the Commission or the courts were to require express rates to be held at an unnecessarily high level, all factors considered, merely to minimize or eliminate any area of price competition between express carriers and carriers of motor freight. The public is entitled to each carrier's service at a fair price. The Commission is admonished in the National Transportation Policy (49 U. S. C. preceding Section 1):

> ". . . to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ."

It would be completely at odds with this admonition, and indeed directly contrary to the public interest, if the Commission were to decree in an application case that a condition of rendering the service authorized is that the carrier involved would always be required to charge more than another carrier, irrespective of lower costs, superior management or any one of a number of other attributes which would justify lower rates. No carrier should be required to charge the public a rate well in excess of the carrier's cost of doing business merely to protect another carrier from the effects of competitive forces. Indeed, just such attempts at manipulation of traffic distribution by arbitrary fixing of rate levels has been flatly condemned by this Court as recently as April 22, 1963, in *Interstate Commerce Commission* v. *The New York, New Haven, and Hartford Railroad Co.*, 372 U. S. 744.

The rate proceedings referred to by appellants as presently pending before the Commission (J. S. 21) are themselves evidence that this Court cannot presume to consider the relationship of rates as a relevant matter in an application case. Each of the cases mentioned has involved extensive hearings; large and complex records are before the Commission. Not a single one of them has been finally decided. When the Commission has ultimately determined the right of R E A Express to maintain the rates and to perform the services covered in the tariffs cited, the appel-

lants will have ample opportunity for judicial review if such is desired.

5. Appellants' Question No. 5 again relies upon erroneous assertions of fact in an attempt to present an issue for review by this Court. It is not a fact that the Commission has changed its interpretation of the "rail-haul" restriction "so as to bestow upon Railway Express, as to hundreds of certificates already issued, greatly enlarged operating rights." The fact is that the Commission has never heretofore interpreted the rail-haul restriction contained in certain R E A certificates as preventing a movement over a connecting motor route so long as some rail haul was involved with respect to the traffic moving over such route. Proof of this interpretation is contained in countless connecting certificates which R E A has received where a rail-haul restriction has been included by the Commission notwithstanding the fact that the only route available to reach a railhead was a movement over an existing R E A motor carrier route.[6] The Commission in the instant case was absolutely correct and consistent with prior precedents when it said (J. S. 72; 91 M. C. C. at page 332):

> "In this posture it becomes clear that a normal rail-haul restriction appears in R E A certificates simply because in obtaining its motor carrier authority, R E A showed that the express service to be rendered would be performed as an integrated rail-

[6] E.g. Sub 1431 (Hoosick Falls, N. Y.—North Adams, Mass.) connecting with Sub 1559 (Albany—Hoosick Falls, N. Y.); Sub 1528 (Concord—Ayer, Mass.)—connecting with Sub 1337 (Boston—Concord, Mass.); Sub 1669 (Mooresville—Taylorsville, N. C.)—connecting with Sub 1100 (Charlotte—Mooresville, N. C.); Sub 1680 (Harrisonburg—Bridgewater, Va.)—connecting with Sub 378 (Harrisonburg, Va.—Washington, D. C.); Sub 1753 (Waterville—Pittsfield, Maine)—connecting with Sub 1660 (Pittsfield—Greenville Junction, Maine); Sub 1899 (Aspers—Gardners, Pa.)—connecting with Sub 561 (Gettysburg—Aspers, Pa.).

motor movement; no all-motor movement was contemplated. In that context was the certificate granted, and in that context must the meaning of the restriction be viewed. The usual rail-haul restriction does not contain any specific prohibition against tacking, and we conclude that an R E A certificate containing such a restriction may be joined with other certificates as long as the traffic moved thereunder is not transported in a wholly motor movement. Compare *Transport Corp. of Virginia Extension—Maryland*, 43 M. C. C. 716."

Appellants' assertion that the Interstate Commerce Commission has changed its interpretation of the rail-haul restriction in R E A certificates, which assertion is the whole basis for their Question No. 5, is simply at odds with the facts. It cannot justify reversal by this Court of the lower court's decision. Appellants apparently placed no reliance in this argument in the court below because they made no mention of this alleged error in their requests for findings by the district court.

Conclusion.

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting further review and that the judgment of the district court should be affirmed.

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February 18, 1964.

Certificate of Service.

I, William J. Taylor, attorney for Railway Express Agency, Incorporated, appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the eighteenth day of February, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On Auclair Transportation, Inc., et al, appellants, by mailing copies in duly-addressed envelopes, with postage prepaid, to Peter T. Beardsley and Richard R. Sigmon, Esqs., 1616 P Street, N. W., Washington 36, D. C., and to Kenneth B. Williams, Esq., 111 State Street, Boston 9, Massachusetts.

2. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., to Robert B. Hummel, Chief, Appellate Section, Anti-Trust Division, Department of Justice, Washington 25, D. C., and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

3. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel at the Office of the Commission, Washington 25, D. C.

William J. Taylor.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 724

AUCLAIR TRANSPORTATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing appellant's complaint which had sought to enjoin an order of the Interstate Commerce Commission. The Commission's order granted five applications by Railway Express Agency ("REA") for certificates of public convenience and necessity authorizing operation as a common carrier by motor vehicle of general commodities

moving in express service pursuant to Section 207(a) of the Interstate Commerce Act, 49 U.S.C. 307(a).[1]

REA is a corporation whose stock is wholly owned by the principal railroads of the United States (J.S. 26). It was organized by these carriers in 1929 to provide the public with express service (J.S. 52). Express companies are classified under the Interstate Commerce Act as common carriers pursuant to the Hepburn Act of 1906 (34 Stat. 584, 49 U.S.C. 1(3)(a)).[2] REA holds itself out to transport all commodities, in any form tendered, covered by its tariff publications and has been called upon to handle, *inter alia,* commodities which are injurious or contaminating to other shipments, commodities requiring special care and protection, and commodities which require armed guard and surveillance (J.S. 45, 46).

Although REA has depended primarily on rail transportation for the performance of its line-haul

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[1] The applications sought authority to transport general commodities (including class A and B explosives) in express service over the following routes: (J.S. 41–42)

Sub No. 1515—(1) between Boston, Mass., and Manchester, N.H.
(2) between Boston, Mass., and Dover, N.H.
1577—(1) between White River Junction, Vt., and Whitefield, N.H.
(2) between Wells River and Newport, Vt.
1594—between Manchester, N.H., and White River Junction, Vt.
1595—between Boston, Mass., and Portland, Maine.
1687—between Hoosick Falls, N.Y., and Middlebury, Vt.

Section 207(a) of the Act and other pertinent statutory provisions are set forth at J.S. 118–122.

[2] REA is not a carrier by railroad under the Interstate Commerce Act (J.S. 68). See *United States* v. *American Railway Express Co.*, 265 U.S. 425.

requirements in the past, its contract with the railroads permits it to utilize any transportation mode for the movement of express (J.S. 53). REA performs some express service under agreements with airlines (J.S. 53). With the discontinuance of passenger train operations, REA has turned increasingly to operation of its own motor equipment over routes previously served by train (J.S. 53, 54); it is this circumstance that gave rise to the five applications involved here (J.S. 46, 48). Before conducting such motor operations, REA must obtain certificates of public convenience and necessity from the Commission pursuant to Section 207(a) of the Interstate Commerce Act (J.S. 121).

Separate hearings on each of the five applications were conducted by Joint Boards of representatives of the States involved, except in the case of Sub. No. 1687 which was heard by a Commission hearing examiner.[3] In each instance a finding was made that the public convenience and necessity required the issuance of the certificate, subject to certain restrictions. On exception to the reports of the Joint Boards covering three of the applications (Sub. Nos. 1577, 1594 and 1595), Division 1, after finding that REA's proposed operations were well within the definition of express service (J.S. 110–111) and that there was a public

[3] Section 205(a) of the Interstate Commerce Act, 49 U.S.C. 305(a), requires the Commission to refer, *inter alia*, applications for motor carrier certificates for operations involving not more than three States to Joint Boards composed of one member from each State within which the operations are to be conducted. When the application involves operations in more than three States, the Commission may, in its discretion, assign the matter to a hearing examiner.

need for such service (J.S. 111–112), granted REA's applications subject to the following four conditions (J.S. 117):

> (1) The service to be performed by applicant shall be limited to that which is auxiliary to or supplemental of rail or air express service.
>
> (2) Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts.
>
> (3) The authority granted herein, to the extent it authorizes the transportation of dangerous explosives, shall be limited, in point of time, to a period expiring 5 years from the date of the certificate.
>
> (4) Such further specific conditions as the Commission, in the future, may find necessary to impose in order to restrict applicant's operations to a service which is auxiliary to, or supplemental of, express service.

An additional condition was imposed in Sub. No. 1595 (J.S. 43):

> Shipments transported by applicant shall be limited to those moving on through bills of lading or express receipts covering, in addition to a motor-carrier movement by applicant, an immediately prior or an immediately subsequent movement by rail or air, except that applicant may render local express service solely between Boston, Mass., and Portland, Maine.

On oral argument and reconsideration, the entire Commission reviewed the matter and on October 5, 1962, issued a Report and Order, affirming Division 1, with minor modifications (J.S. 39–90). Its opinion undertakes "a thorough re-examination of REA op-

erations" (J.S. 54) and incorporates the following findings: that the service covered by each of the five applications was needed by the shipping public for expedition and special handling of a variety of shipments (J.S. 46–51); that none of the protestants had furnished an express service; and that they had made no showing that they were interested in or capable of doing so (*ibid.*).[4] It observed, as it has on past occasions, that express service involves "the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges" (J.S. 59).[5]

In dealing with the distinct nature of REA's service, the Commission also pointed out that REA shipments average only about 50 pounds, in contrast to the 200-pound average of shipments handled by protestant Dubrey (J.S. 62–63), and that while the record did "not establish conclusively a firm division of small and large parcel traffic between REA and ordinary common carriers in all circumstances" the evidence showed "the strong probability of such a division" (*ibid.*).

---

[4] Protestant Dubrey, a motor common carrier, conceded before the Commission that although its certificate and tariffs would authorize express service, REA performs a service which it is not accustomed to rendering (J.S. 51).

[5] In similar vein, it stated (*ibid.*) that a service may be characterized as an express service on the basis of its "expediency, premium rates, and special handling" as contrasted with "the services and rates provided and assessed usually by common carriers or ordinary freight."

Having found that there was a need for the services proposed by REA, the Commission next considered whether the policy of Section 5(2)(b) and the National Transportation Policy (J.S. 118–120) required it to impose the restrictions which it has customarily applied to rail-affiliated motor carrier operations. It concluded that such restrictions were not appropriate here because of the unique characteristics of express service.[4] Noting that "special circumstances" may obviate the need for some or all of the restrictions imposed on *any* rail-affiliated motor carrier under Section 207(a), the Commission stated that "we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist" (J.S. 83). The Commission substantially approved the restric-

[4] In this connection, the Commission reviewed the history of its licensing policy with regard to rail affiliates generally. It found that the peculiar characteristics of express service had resulted in the imposition upon REA of restrictions different from those imposed upon ordinary rail-affiliated motor service. While the latter service was ordinarily restricted to service auxiliary to or supplemental of railroad operations, the REA restrictions had always referred to service auxiliary to or supplemental of "air or railway *express* service" (J.S. 66–67, emphasis in ICC report); the "air or railway" portion of the restriction being "merely an evidentiary reflection of the way in which express traffic usually moves . . ." (J.S. 70). The Commission noted that, in distinction from other rail-affiliated motor carriers, REA's certificates had never been restricted to serving points located on a railroad. Finally, the Commission stated that a restriction limiting REA's services to those having an immediately prior or subsequent movement over steel rails (the so-called "rail-haul" restriction) was simply utilized in the past "to reflect the type of need shown in each case for the service proposed" *i.e.*, an integrated rail motor movement. (J.S. 72).

tions recommended by the initial decision, set forth *supra* (J.S. 88–89).[7]

The district court sustained the Commission's award of the five certificates, rejecting the two major contentions raised by appellants: (1) that the Commission, through an erroneous application of the definition of express service, had mistakenly concluded that a public need existed for the express service authorized; and (2) that the Commission should have imposed a "rail-haul" restriction because the policy of the Interstate Commerce Act is opposed to rail-affiliated motor operations unrelated to rail operations.

With respect to the public need for express service, the court stated that the Commission's definition of express service was conceded by plaintiffs to be "well-recognized" (J.S. 30). The court then referred to the "voluminous evidence" that there is need for the service; that it is a continuation of the express service formerly handled by discontinued rail passenger trains; and that extensive express shipments are now being handled by REA pursuant to temporary operating authority (J.S. 31). The court noted that the plaintiffs "do not challenge the finding that they have to date shown no willingness to perform express service of any kind" (J.S. 32), and concluded (J.S. 33–34):

> Plaintiffs have failed to show that the Commission's findings are insufficient as a matter

[7] The specification of "rail or air" express service in the first restriction was removed; in No. 1687 the second restriction was replaced with one requiring an immediate prior or subsequent movement in express service. And, the "rail-haul" restriction imposed in No. 1595 was removed.

> of law to support its discretionary judgment that the public convenience and necessity require the issuance of the certificates which REA was granted. Nor have they shown that the findings are unsupported by substantial evidence.

The court also concluded that there were special circumstances justifying the Commission's refusal to restrict REA's operations to situations in which there was an immediately prior or immediately subsequent movement of the goods over steel rails. The court stated that the Commission was well within its authority in granting the certificates unrestricted in this manner since otherwise shippers would have been denied express service, motor common carriers being unable or unwilling to perform such service (J.S. 36–37). This result was also held to satisfy the National Transportation Policy (which requires the Commission to recognize and preserve the inherent advantages of each mode of transportation) since express service is *sui generis* and competitive to only a limited extent with motor common carriers (J.S. 37).

ARGUMENT

Although framed in the form of five different questions, the jurisdictional statement essentially presents two issues: whether the service to be rendered by REA was properly held to be "express service" as that concept has been defined by the Commission; and whether the district court erred in affirming the Commission's finding that special circumstances and the unique characteristics of REA's express service justify the lack of a rail-haul restriction in the cer-

tificates. Viewed in the light of the evidence and findings, neither issue presents a substantial question warranting plenary review.

1. Appellants argue (J.S. 17–22) that the Commission erred in failing to apply the accepted definition of "express service" in determining whether the grant of REA's applications would serve the public convenience and necessity. They do not quarrel, however, with the definition of express service stated by the Commission in its report (J.S. 17). Nor, as the district court noted (J.S. 32), do they claim that existing motor common carriers are willing and able to provide the service to be rendered by REA. Essentially, then, they concede that REA offers a unique service which is different from ordinary motor carrier operations and which those carriers are unwilling to supply. This, we submit, is a sufficient answer to appellants' contention.

In addition, however, the record includes ample evidence showing that the service to be offered by REA meets the commonly accepted definition of an express service. It is a service for small parcel traffic. Statistics compiled for a representative seven-day period over the very routes for which REA sought permanent authority disclosed that the average weight of each REA shipment was 41.5 pounds and the average weight of each piece was 28.9 pounds. In contrast one of the protestant motor common carriers had shipments averaging 200 pounds (J.S. 62–63). REA offers the special handling needed for the shipment of perishables, such as shellfish and eggs, and the armed

surveillance required by shippers of highly valuable items such as silverware and electronic equipment. Such care is a dominant characteristic of express service. Finally, REA offers an expedited service on a daily basis (J.S. 49–50).*

Appellants may be suggesting (J.S. 7, 15, 18, 22) that although REA offers an express service, there is no need for that service and, once authorized, REA will merely draw traffic which would be regularly handled by the motor common carriers. If this is their contention, it is fully answered by the district court's holding that substantial evidence (summarized at J.S. 30–32) supported the Commission's determination of a public need and a desire for the express service to be performed by REA. See *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173, 194.

2. The unique characteristics of express service also establish that the Commission was acting within its discretion in concluding that no "rail-haul" restriction need be imposed on the certificates awarded to REA.

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* Appellants question the rates REA proposes to charge (J.S. 17–22). But as the district court held, whether or not REA's rates are presently at a level appropriate to the premium quality of its service is irrelevant to the case at bar. (J.S. 33). Plaintiff's remedy against unduly low rates is in a complaint proceeding against the rates under 49 U.S.C. 316(a), not in a certificate proceeding which can properly deal only with the service aspects of REA's operations. *American Trucking Ass'ns.* v. *United States*, 326 U.S. 77, 86–87; *Railway Express Agency* v. *United States*, 153 F. Supp. 738, 741 (S.D. N.Y.) affirmed 355 U.S. 270. "Until this administrative remedy has been exhausted, complaint to the courts is premature" (*ibid.*). The Commission, at the present time, has before it several proceedings regarding REA's rates, in which motor carriers are participating. *E.g.*, *Freight, All Kinds, L.C.L. Container Charges–U.S.A.*, I.C.C. Docket 33977.

Section 5(2)(b) forbids acquisition of motor carriers by railroads or their affiliates unless the acquisition will be auxiliary and supplemental to the rail carriers' services. This statute reflects a Congressional purpose to prevent wholesale incursions by rail carriers into motor carrier operations. It was intended to answer fears that the rail carriers, by subsidizing their affiliates' competition against motor common carriers, might destroy this competing mode of transportation. *United States* v. *Rock Island Motor Transit,* 340 U.S. 419, 432. The policy of Section 5(2)(b) is applied to certificate proceedings under Section 207 and has been interpreted to forbid certification of a rail-affiliated motor carrier for service other than that auxiliary to and supplemental of rail service except when "special circumstances" justify the lifting of the restrictions. *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141; *American Trucking Ass'ns.* v. *United States,* 364 U.S. 1.

To meet this test, the Commission must find, on specific facts and circumstances, that unrestricted operations by the rail affiliate are in the public interest. *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 149, 150. In this case, the Commission initially made an exhaustive review of the unique function and other attributes of express service and an analysis of its historic practices in certificating REA. Based upon this review, it recognized that the restrictions ordinarily appended to rail-affiliated motor carrier certificates "may not be relaxed, and the motor vehicle operations accordingly dissociated with those of the parent, unless special circumstances

are shown to exist" (J.S. 82). Turning to the authority sought by REA, the Commission concluded: "[W]e are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist" (J.S. 83). The district court in turn affirmed the Commission's decision not to impose the "rail-haul" restriction, holding that "the Commission has in fact found the necessary special circumstances" (J.S. 36).

Appellant professes to find an inconsistency between the rationale of the Commission's decision, which it claims was based on a theory that REA's express service is unique, and the district court's affirmance of the Commission's decision on the basis of a finding of special circumstances. Apart from the fact that the Commission made a finding, *in haec verba*, that special circumstances in fact exist, it is clear that the Commission's statement of the unique position of REA was but an extended review of the factors which, in its judgment, provide a basis for determining the scope within which REA is to be permitted to conduct motor carrier operations. Moreover, as the district court noted (J.S. 35), the unique characteristics of, and the public need for, express service had been relied on by the Commission in granting certificates to REA in the past without a rail-haul restriction. See *e.g.*, *Railway Express Agency, Inc., Extension of Operations—Newport, R.I.*, 31 M.C.C. 689.

In any event, the requirement of "special circumstances" is but an expression of the Commission's continuing duty to adjust the competing claims of

rail carriers and motor carriers pursuant to the National Transportation Policy (49 U.S.C. preceding § 1) (J.S. 118), which requires the Commission "to recognize and preserve the inherent advantages of each [mode of transportation]." As this Court has said, the policy of Section 5(2)(b) is "a guiding light, not . . . a rigid limitation" when applied to certificate applications for motor service by rail carriers or affiliates. See *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 149. Judged by this standard, the Commission's grant of the certificates is this case properly preserves for shippers the flexibility and expedited service inherent in express service while leaving to motor common carriers their usual operations, which are non-competitive with express service.[9]

3. Although appellants claim that the Commission's decision will enlarge REA's operations under existing certificates, by enabling them to "tack" numerous certificates together, it is plain that such fears are unfounded. The Commission took note of REA's practice of tacking certificates together and thereby performing a through all-motor service despite restrictions (in some of its certificates) requiring immediately prior or subsequent movement by rail. It

[9] The undesirable result of indiscriminate imposition of a rail-haul restriction in REA certificates was graphically stated by Division 1. In describing REA's operation in Sub Nos. 1577 and 1594 in the event a rail-haul restriction were imposed, the Division noted that because of the lack of passenger train service, "shipments moving from, to, or through Boston would have to move by freight trains or in a highly circuitous manner by passenger trains" (J.S. 115).

declared the practice "not permissible," told REA to petition for modification of these certificates within 90 days, and invited the interested parties to participate (J.S. 74). Also the Commission expressly retained jurisdiction over the awards and reserved the right to impose such further restrictions as may be necessary (J.S. 89).

CONCLUSION

For the foregoing reasons, we believe this appeal presents no substantial question warranting plenary review by this Court, and that the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1963

AUCLAIR TRANSPORTATION, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Massachusetts

---

REPLY TO MOTIONS TO AFFIRM

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REPLY TO MOTIONS TO AFFIRM

Preliminary

Because we believe the questions involved in this proceeding are of paramount importance in the administration of the Interstate Commerce Act by the Commission, and to the transportation industry, appellants, pursuant to the provisions of Rule 16(3), file this reply to the motions to affirm filed jointly by the United States of America and the Interstate Commerce Commission, and separately by Railway Express Agency, Incorporated.

The Motions To Affirm Manifest A Substantial Confusion About The Basis For The Commission's Decision

Not unexpectedly, each of the appellees contend that this appeal presents no substantial question warranting plenary review by this Court. But the motions to affirm manifest a substantial and unresolvable confusion about the basis of the Commission's decision. Thus, the United States and the Commission (hereinafter the Government), in their joint brief, put forth two bases for the decision and completely fail to overcome the irreconcilable conflict between the two rationales.

At p. 6 of the joint brief, the Government states that the basis of the Commission's determination that the policy of Section 5(2)(b) and the National Transportation Policy did not require the imposition of the usual rail-affiliate restrictions was the conclusion "that such restrictions were not appropriate here because of the unique characteristics of express service."[1] And again at p. 10, the Government argues that "the unique characteris-

[1] In their footnote at this point, the Government refers to the Commission's discussion of the supposed historically different treatment of Railway Express, a discussion based in part at least on factual misunderstanding. For example, the footnote refers to the Commission noting that, in distinction from other rail-affiliated motor carriers, Railway Express's certificates "had never been restricted to serving points located on a railroad." This claim had not been made by any party before the Commission and was first stated in the Commission's decision. J.S. 67 It is curious that the Government still relies on this alleged fact when appellants' brief to the District Court referred to a number of Railway Express certificates in the Commission's public records which in fact do restrict the service only to rail points: e.g., Railway Express's certificates Sub-Nos. 12, 182 (not just rail points but stations of a named railroad), 251, 258, 374 (also to points of a named railroad), 435, 448 (also to points of a named railroad). And the Commission itself has noted that where, as with many of Railway Express's applications, all of the service points are rail stations, a rail-point restriction would be meaningless. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 465, n. 4 (1956).

tics of express service" justified the Commission's conclusion that no "rail-haul" restriction need be imposed in the certificates awarded to Railway Express. On the other hand, the Government brief concedes, at pp. 11-12, that the restriction of rail-affiliated motor carrier certificates may not be relaxed unless "special circumstances" are shown to exist but claims that the Commission did in fact find special circumstances exist to justify the grant of certificates here without such restrictions. The Government's inability to determine the actual basis of the Commission's decision is shown by its wedding of the two inconsistent rationales in its second issue: "whether the district court erred in affirming the Commission's finding that special circumstances and the unique characteristics of REA's express service justify the lack of a rail-haul restriction in the certificates." pp. 8-9

The Government's second numbered argument, pp. 10-13, manifests a complete confusion of these two inconsistent rationales. It commences with the proposition that "the unique characteristics of express service establish that the Commission was acting within its discretion in concluding that no 'rail-haul' restriction need be imposed on the certificates awarded to REA." But its support of this contention is an acknowledgement that it is the railroad affiliation of the applicant rather than the nature of the service proposed which runs afoul of the anti-monopoly policy expressed in Section 5(2)(b). The Government correctly states that the policy "was intended to answer fears that the rail carriers, by subsidizing their affiliates' competition against motor common carriers, might destroy this competing mode of transportation." And it concedes that this policy has been interpreted to forbid certification of rail-affiliated motor carriers "for service other than that auxiliary to and supplemental of rail service except when 'special circumstances' justify the lifting of the restrictions."

The Government concludes this section of its brief with the statement that the Section 5(2)(b) policy and its "special circumstances" requirement are expressions of "the Commission's continuing duty to adjust the competing claims of rail carriers and motor carriers pursuant to the National Transportation Policy." pp. 12-13 But we submit that no such broad discretion as this suggests was intended by Congress. Rather than allowing for the interplay of competing railroad and motor carrier claims of relatively equal value, "Congress," as this Court said in *American Trucking Associations* v. *United States*, 364 U.S. 1, 6, "has expressed a strong general policy against railroad invasion of the motor carrier field." And, having re-enacted the provisions now in Section 5(2)(b) after some of the pertinent Commission decisions had been specifically called to its attention, Congress must be presumed to have approved the Commission's policy of restricting railroad affiliates to auxiliary and supplemental service. 364 U.S. 6-7. In view of this Congressional approval of the implementation of its policy, the Commission cannot now, without appropriate new legislation, retroactively change its position. This Court told the appellees in the *A.T.A.* case, 364 U.S. 15, that it was not the proper forum for changing this policy but that "the pardoning power in this case belongs to Congress." We submit that such a restriction lies no less heavily on the Commission.

The Government is in the position of straddling two horses charging in different directions. It defends the Commission's conclusion, J.S. 67, that it need not limit Railway Express, like other railroad affiliates, to operations auxiliary or supplemental of rail service because of its supposed unique status or, as expressed in the motion to affirm, "because of the unique characteristics of express service." p. 6 But the Government also recognizes that it is the railroad affiliation of the applicant rather

than the nature of the service which runs afoul of the legislative policy. Since the Government admits, p. 7, that the policy was designed to prevent railroads or their affiliates from engaging in all-out competition with independent motor carriers, it is difficult to understand how the Government can continue to argue that the Commission properly decided not to limit this railroad affiliate to service auxiliary to and supplemental of *rail* service because of the type of operations to be conducted.

Railway Express's interpretation of the Commission decision disagrees with that of the Government, since it contends that the Commission "specifically refused" to treat it differently from other rail-affiliated motor carriers, but based its decision solely on a finding of "special circumstances." pp. 5-6

The District Court's decision was not based on the unique status rationale but rather rested on the conclusion that the Commission "has in fact found the necessary special circumstances." J.S. 36 We submit that such basic and irreconcilable confusion about the basis of the Commission's decision, which unfortunately was not dispelled by the District Court's decision, requires clarification by this Court on review.

The Commission's Decision Was Not Based On A Finding Of Special Circumstances

While Railway Express contends that the sole basis of the Commission's decision was a finding of special circumstances, the Government's motion indicates doubt as to the actual basis for the conclusion not to attach the usual rail-oriented conditions. We submit, however, that the Government brief correctly states the basis of the Commission's decision, p. 6, when it says, "It concluded

that such restrictions were not appropriate here because of the unique characteristics of express service." [2]

Both the Government and Railway Express cite a statement of the Commission in its "summary or discussion," J.S. 83, as a finding of special circumstances in these proceedings. All of the appellees fail to recognize that the Commission there was not making findings in these specific cases, but was stating certain principles for future application in Railway Express cases. This is clear from the Commission's introductory sentence: "What we have said above has been mostly in an interpretive vein, and we think it necessary to attempt now to indicate generally with what force and in what manner these interpretations will effect the disposition of certain issues arising in REA applications." J.S. 82

Both motions to affirm quote only that portion of the paragraph containing the supposed finding of "special circumstances." When read in context of the complete paragraph, it is manifest that the supposed finding is no finding at all.

> When REA seeks to institute motor vehicle operations which are not auxiliary to or supplemental of those of the express company then, in order for it to succeed, it must show that special circumstances exist. For example, if REA should seek to render an irregular-route service, which service, as we have noted, has not been considered to be in the nature of an express service, it would appear that special circumstances would have to be shown in order for such application to be granted. Also, because the

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[2] We agree that the Commission's decision rested on this conclusion. But we point out that in *American Trucking Associations* v. *United States*, 364 U.S. 1, 14-15, this Court overturned a similar holding by the Commission and held that a conclusion that the auxiliary and supplemental restrictions are inappropriate because of the nature of the service is not an adequate basis for granting authority without those restrictions.

> express company is affiliated with the railroads within the meaning of section 5(2)(b), we believe that special circumstances must exist in order for REA to obtain a certificate authorizing motor vehicle operations wholly disassociated from rail operations. However, we are convinced that where the existing motor carriers are not rendering regularly an express service, special circumstances do, in fact, exist. J.S. 83

Certainly the first and second sentences are inappropriate to any specific finding in these proceedings, since Railway Express here seeks neither to perform operations not auxiliary to or supplemental of those of the express company, nor to render an irregular-route service. The conditional form for stating the three examples indicate that these are enunciations of general principles rather than specific findings. Only when it is recognized that, in its own words, the Commission was stating certain "guidelines" for "the course of events to come," J.S. 85, rather than making specific findings in the instant proceedings, does this entire paragraph—indeed, the entire section headed "summary or discussion"—make any sense.

When read in context, it is clear that the District Court erred in concluding, J.S. 36, that the Commission had made a finding of special circumstances in the instant proceedings that would justify the grant of motor carrier certificates without the usual rail-oriented restrictions.

Railway Express Misconstrues The Purpose of Section 5(2)(b)

In its argument in support of the contention that the Commission found the existence of "special circumstances," Railway Express misconstrues the purpose and intent of Section 5(2)(b). This is perhaps most clearly shown in the statement, p. 5, that in the light of the history and purpose of the section, "it would appear that

stock ownership by some 60 railroads is far different from the type of control Congress had in mind when it enacted that section."

The purpose of Section 5(2)(b), as this Court recognized in the *Rock Island* case (*United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 432 (1951)), is to prevent railroads from invading the field of trucking where their resources might be used to quickly destroy independent motor carrier competition. Where the affiliate of one railroad admittedly would have the power to rapidly eliminate competition in its area of operations unless restrained, a nationwide motor carrier affiliated with all of the country's major railroads and able to draw upon all of their resources, would have unlimited power to destroy independent motor carrier competition anywhere in the country or throughout the country. The difference occasioned by multi-railroad affiliation is one of degree rather than one of quality as implied by Railway Express. If the motor-carrier affiliate of an individual railroad must be restrained to protect independent competition, *a fortiori* the motor carrier affiliate of all the major railroads collectively must be so restrained.

In the face of a line of decisions by this Court to the contrary, Railway Express contends that motor carrier operations of rail affiliates need not be limited to those usable to public advantage in the rail service, p. 6, and surprisingly quotes from this Court's opinion in *American Trucking Associations* v. *United States*, 355 U.S. 141, 151-152 (1957), including the statement, "[W]e do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplemental limitations in a § 207 proceeding." This is a particularly inapposite citation by appellee since what is involved here is no occasional departure from the auxiliary and supplemental limitations. Rather, this decision by the Commission

represents a wholesale creation of unfettered nationwide railroad motor-affiliate authority to perform general freight service, because the independent motor carriers traditionally have not been given the commodity authority needed to perform a complete express service.

Railway Express would probably have recognized the inappropriateness for its purposes of the quoted material from the *A.T.A.* case had it read the entire page where the quotation began. 355 U.S. 151 The Court there placed the "special circumstances" test in proper perspective by quoting its own earlier conclusion that "[r]ail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service," and by quoting the Commission's statement of the test:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden . . . by reason of the very circumstance that it is a railroad. Where it fails to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, 475

Permitting a rail affiliate occasionally to depart from the line of the railroad to serve communities without other transportation service is far different from granting nationwide general commodity motor carrier authority unrestricted to auxiliary and supplemental service merely because the rail affiliate applicant is an express company or because the independent motor carriers have not been authorized to transport the full range of general commodities.

Railway Express also suggests that the grant of authority to transport general commodities moving in ex-

press service and the reservation of the right to add future conditions are somehow relevant to the implementation of the Section 5(2)(b) policy. p. 9 It is not the nature of the service, but whether the motor operations are functionally tied to rail service, which determines whether the policy is being carried out. In *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960), this Court held that the fact that the type of service (contract carriage) was incompatible with the auxiliary and supplemental restriction did not mean that the policy must be ignored, but rather that the application could not be granted. In the same case, this Court held that a "future conditions" limitation does not satisfy the policy, saying that such a restriction "obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service." 364 U.S. 12

The Appellees Misstate Our Argument Regarding Express Service

Railway Express states, p. 12, that the argument regarding the definition of express service is nothing more than an argument that the Commission's finding is not supported by substantial evidence. The Government says, p. 9, that appellants "concede that REA offers a unique service which is different from ordinary motor carrier operations and which those carriers are unwilling to supply." Both of the motions to affirm fail to come to grips with the real issue: the Commission specifically refused to apply its own definition of "express service" so as to determine whether there is a need for such service which the existing motor carriers are failing to fill. Additionally, the Government statement is a complete distortion of appellants' argument and is based, in part at least, on a misreading of the District Court opinion. The Government reads the District Court as referring to independent motor carrier performance of "the service to be ren-

dered by REA," whereas the District Court's actual reference was to the performance of "express service." J.S. 32

And this is the crux of the problem: the Commission assumes that the proposed service is express service merely because Railway Express proposes to perform it. The Government says, p. 9, that Railway Express "offers the special handling needed for the shipment of perishables," in the face of a finding by the Commission, J.S. 85, that much of the traffic involved is not "traffic which inherently requires special handling of the type excluded from the authorities of, or not otherwise normally handled by, the protestants," and in spite of the Commission's rejection of the argument that the burden is on Railway Express to show that the proposed service will include "a significant number of commodities requiring, by nature, special handling." J.S. 84 We agree with the Government: "Such care is a dominant characteristic of express service." p. 10 Unfortunately, the Commission found that such care is not necessary for much of the traffic, and specifically concluded, in any event, that it would not measure the proposed service against such a "special handling" test.

The only other evidence suggested by the Government that express service is proposed is, p. 9, that "it is a service for small parcel traffic." But the proposed grants are in no way restricted to the handling of "small parcels," even if that were accepted as an adequate test of express service.

Both motions to affirm quarrel with appellants' argument that the rates for the service are evidence of whether true express service is being offered. In fact, the Government argues, p. 10, n. 8, that whether premium rates are being charged is "irrelevant" to this case, even while quoting, p. 5, the Commission's conclusion that ex-

press service "is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges."

The Government Misunderstands The Effect Of This Decision On The Scope Of Outstanding Railway Express Certificates

Appellants pointed out, J.S. 12, that the Commission's decision not to apply its long-standing interpretation of the "rail-haul" restriction to Railway Express certificates so restricted will greatly enlarge those outstanding certificates. The Government says, pp. 13-14, that such fears are unfounded but shows that it does not understand the basis of such fears. The Government assumes that they arise from past actions by Railway Express in ignoring the restriction, whereas appellants' fears are based on the Commission's conclusion to interpret the "rail-haul" restriction differently for Railway Express than for other railroad affiliates.

Even though Railway Express insists, p. 5, that the Commission treated it no differently from other railroad affiliates, in response to this argument it apparently had to hide behind the unique status given to it in this decision. Railway Express ignores the long-standing interpretation given to the "rail-haul" restriction in the certificates of other railroad affiliates, and argues about the absence of an interpretation of that restriction in a Railway Express case. The Commission's long-standing construction of the "rail-haul" restriction as requiring an *immediately* prior or subsequent movement over steel rails was reinterpreted in this decision as only prohibiting "a wholly motor movement." J.S. 72 This constitutes a substantial enlargement of numerous outstanding Railway Express certificates containing such a restriction, contrary to the provisions of the Interstate Commerce Act.

In its motion to affirm, Railway Express cites the Court's conclusion in *Arrow Transportation Company* v. *Southern Railway Co.*, 372 U.S. 658, 673, that it is for the Commission rather than the Courts to achieve a balance between the competing forms of transportation. We submit that the Court, in the sentence following the one cited by Railway Express, was distinguishing the *Arrow* situation from that which is involved in the instant case: "It is reasonable to suppose that had Congress felt that balance to be in danger of distortion, it would have addressed itself to our problem directly by enhancing the powers granted the Commission to enforce the [national transportation] policy." Here, Congress did feel that balance to be in danger of distortion and explicated its guidance to the Commission in Section 5(2)(b). The question for the Court is whether the Commission has heeded the Congressional mandate and properly utilized the powers given to it to maintain the necessary balance between the competing transportation modes.

The basic problem with which the Commission's decision here confronts the independent motor carrier industry is: it stretches a standard based on the unwillingness of such carriers, even though properly certificated, to provide a needed service, to encompass a completely dissimilar situation, i.e., one in which the independent motor carriers do not possess the requisite commodity authority to perform an express service.

In the first instance, represented by the *Rock Island* case, the Commission held that the independent motor carriers, although possessing the necessary authority, had not furnished the required service "except where it suited their convenience."[3] Having failed to perform their common-carrier obligation, the independent carriers were, in

[3] 63 M.C.C. 91, 102, quoted, *American Trucking Associations* v. *United States*, 355 U.S. 141, 170-71, n. 10.

effect, told by this Court that they were in no position to complain because the Commission allowed another carrier, albeit a rail affiliate, to fill the gap.

If the independent carrier interests were here attempting to prevent the rail affiliate involved from performing a *bona fide* express service, the *Rock Island* case would afford a parallel and serve as precedent. But what the independent carriers seek here is simply to prevent Railway Express from invading, on a wholesale basis, the field of general freight transportation which they occupy, and which, generally speaking, they are serving adequately. That wholesale invasion will be accomplished, however, if the Commission is allowed to equate, as it has here, the inability of the average motor carrier to render a true *express* service, because such authority has neither been traditionally sought nor granted, with an unwillingness on the part of motor carriers generally to provide an adequate *freight* service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard R. Sigmon, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the eleventh day of March, 1964, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly-addressed envelopes, with postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington, D. C., 20530, and to William H. Orrick, Jr., Assistant Attorney General, and to attorneys Lionel Kestenbaum, and Michael I. Miller, Department of Justice, Washington, D. C., 20530, and to W. Arthur Garrity, Jr., Esq., United States Attorney, 1107 U. S. Post Office & Courthouse Building, Boston 9, Massachusetts.

2. On the Interstate Commerce Commission, by mailing copies in duly-addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and H. Neil Garson, Esq., Associate General Counsel, at the Offices of the Commission, Washington, D. C., 20423.

3. On Railway Express Agency, Inc., intervening defendant, by mailing copies, in duly-addressed envelopes, with postage prepaid, to William J. Taylor and William H. Marx, Esqs., 219 East 42d Street, New York 17, New York, and to J. Joseph Maloney, Jr., Esq., 31 Milk Street, Boston 9, Massachusetts.

RICHARD R. SIGMON